No. 03-8661

In The
Supreme Court of the United States

MELVIN T. SMITH,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

On Writ Of Certiorari To The Appeals Court Of The Commonwealth Of Massachusetts

JOINT APPENDIX

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DOCKET ENTRIES

Commonwealth of Massachusetts
SUFFOLK SUPERIOR COURT

Entry Date:	Paper No:	Docket Entry:
10/06/1998		Case opened to issue docket# to grand jury
10/08/1998	1	Indictment returned
10/08/1998	2	Motion by Commonwealth for arrest warrant to issue; filed & allowed (Carol S Ball, Justice)
10/08/1998		Warrant on indictment issued via WMS
11/03/1998		Brought into Court-warrant recalled via WMS.
11/03/1998		Appointment of Counsel Carroll
11/03/1998		Deft arraigned before Court
11/03/1998		Deft waives reading of indictment
11/03/1998		RE offense 1: Plea of not guilty
11/03/1998		Deft released on personal recognizancein [sic] the amount of $100.
11/03/1998		Commonwealth moves for trial with Indictment #96-11471, Offenses 001 and 002. The Court, Donovan, RAJ orders jury of fourteen (14) members impanelled [sic]. Jury impanelled [sic] but not sworn. Jury allowed to separate and

	reconvene on November 4, 1998. Donovan, RAJ – J. Puleo, ADA – M. McDonald, Court Reporter – B. Carroll, Attorney.
11/04/1998	Brought into Court. Jury of fourteen (14) members sworn for trial with Indictment #96-11471, Offenses 001 and 002. Trial commences.
11/04/1998	Defendant's oral motion for Mistrial made and after hearing, denied.
11/04/1998	Jury allowed to separate and reconvene on Thursday, November 5, 1998 at 9:00 A.M. Donovan, J. – J. Puleo, ADA – M. McDonald, Court Reporter – B. Carroll, Attorney
11/05/1998	Brought into Court. Trial continues. Jury allowed to separate and reconvene on Monday, November 9, 1998 at 9:00 A.M. Donovan, RAJ – J. Puleo, ADA – M. McDonald, Court Reporter – B. Carroll, Attorney
11/09/1998	Brought into Court. Trial continues.
11/10/1998	Brought into Court. Trial continues.
11/10/1998	Deft files Proposed Jury Instructions (Paper #43 in 96-11471) M. McDonald, Court Reporter

11/12/1998		Brought into Court. Trial continues. Commonwealth rests it's case in chief.
11/12/1998	3	Deft files Motion for Required Finding.
11/12/1998		Motion (P#3) allowed after hearing.
11/12/1998		Motion (P#3) after hearing re: reconsideration of the Court's ruling, the Court orders Motion for Required Finding be denied. Defendant rests it's case in chief. Defendant's Motion for Required Finding of Not Guilty orally renewed. After hearing, denied.
11/12/1998		Jury reduced to twelve in number and the names of Stephen Collins (Juror #12-06) and Scott Blanchette (Juror #12-08) were drawn and designated as alternate jurors to be kept separate and apart. Jury deliberations commence. Jury allowed to separate and reconvene on Friday, November 13, 1998. Donovan, RAJ – J. Puleo, ADA – M. McDonald, Court Reporter – B. Carroll, Attorney.
11/13/1998		Brought into Court. Jury deliberations resume. Reconsideration of motion #3 after hearing taken under advisement. Jury allowed to separate and reconvene on Monday,

		November 16, 1998 at 9:00A.M. M. McDonald, Court Reporter.
11/16/1998		Brought into Court – reconsideration of motion #3 denied. Jury resumes deliberation. Question received from jury and marked "G" for identification. Question received from jury and marked "H" for identification.
11/16/1998		RE offense 1: Guilty verdict as to
11/16/1998	4	Verdict Affirmed. Verdict Slip filed. Commonwealth moves for trial as to fourth and subsequent offense.
11/16/1998	5	Waiver of trial by jury filded [sic]. After colloquy of defant [sic] – Trial before Donovan, RAJ without jury.
11/16/1998		Finding of guilty (Elizabeth B Donovan, Justice) Commonwealth moves for sentencing.
11/16/1998		Sentence imposed: M.C.I. Cedar Junction Max. 12 Years – Min. 10 Years, concurrent with sentence imposed on 96-11471 offense #001.
11/16/1998		Notified of right of appeal under Rule 64
11/16/1998		Notified of right of appeal under Rule 65
11/16/1998		Sentence credit given as per 279:33A: 807 days.

11/16/1998		Notice of appeal filed. (Paper #48 in 96-11471)
11/16/1998		Motion to withdraw and appointment of successor counsel filed. (Paper #49 in 96-11471)
11/16/1998		Motion (P#49 filed in 96-114710) allowed except as to Appellate Division. Committee for Public Counsel Services appointed to represent defendant for appeal purposes. Donovan, RAJ – J. Puleo, ADA – M. McDonald, Court Reporter – B. Carroll, Attorney.
01/25/1999	6	Deft files motion for free transcripts.
01/29/1999		Copy of notice of appeal mailed to Donovan, J and J.Puleo, ADA Letter sent to Court Reporter M.McDonald Re: Transcripts of November 3,4,5,9,10,12,13,16,1998 for trial – verdict – disposition before Donovan,J.Certificate of Clerk – filed.#50 in 96-11471)
04/10/2000		Transcript of testimony received from M.McDonald, Court Reporter.
04/24/2000		Transcript of testimony received from M.McDonald, Court Reporter.
05/04/2000		Transcript of testimony received from M.McDonald, Court Reporter.

06/05/2000		Transcript of testimony received from M.McDonald, Court Reporter.
06/29/2000		Notice sent to attorneys that transcripts are available.
07/07/2000		Certificate of delivery of transcript by clerk – filed. Paper # 51 in 96-11471.
07/20/2000		Certificate of delivery of transcript by clerk – filed. Paper # 52 in 96-11471.
07/24/2000		Notice of completion of assembly of record sent to Appeals Court and attorney for commonwealth and defendant.
07/24/2000		Two certified copies of docket entries, original and copy of transcript, two copies of exhibit list and list of documents #48, each transmitted to clerk of Appellate Court.
07/25/2000	7	Notice of docket entry received from the Appeals Court, Filed.
02/14/2001	8	Deft files motion for discovery, evidentiary hearing and issuance of indigent summonses. (Donovan, J. & J. Sullivan, ADA notified 3/2/01)
02/14/2001	9	Deft files motion for leave to file an amended motion for a new trial affidavit of Attorney Nathanson. (Donovan, J. & J. Sullivan, ADA notified 3/2/01)

02/14/2001	10	Deft files motion for a new trial and for relief from unlawful restraint & memorandum in support of. (Donovan, J. & J. Sullivan, ADA notified 3/2/01)
02/27/2001	11	Deft files notice of appearance and statement of opposition to defendant's motion for nre [sic] trial.
03/08/2001		P#56 endorsed thereon: "motion to amend is allowed. The Commonwealth shall file its written response to all motions within 45 days of the filing of the amended motion." Donovan, J (filed in case no. 1996-11471 – notice on same)
04/02/2001	12	Deft files amended motion for a new trial and amended memorandum in support of motion for new trial with affidavit of Attorney David Nathanson & affidavit of motion. (Paper No. 59 in 96-11471).
04/20/2001		Copy of Defendant's Motion Paper # 59 in 96-11471 endorsed thereon 4-13-01. Motion to release from restrain[t] is denied. The Commonwealth has 45 days to file respone [sic] to the motion for new trial. Donovan, J.
05/09/2001		Notice of appeal, filed. (Paper No. 60 in 96-11471)
05/22/2001		Copy of notice of appeal mailed to Donovan, J and J.Ditkoff, ADA

05/29/2001	13	Commonwealth files opposition to defendant's amended motion for new trial. (Paper #61 filed in 96-11471)
06/27/2001		Memorandum of Decision and Order on defendant's motion for new trial, denied. Donovan, J. (Paper No. 63 in 96-11471)
07/16/2001		Deft files: Notice of appeal as to the denial of his motion for new trial. (Paper #64 in 96-11471)
07/27/2001		Notice of docket entry recived [sic] from Appeals Court – Stay is vacated –
07/27/2001		Appeal from denial of New trial Motion is consolidated with the pending appeal without need for further assembly. Suffolk Superior Criminal Court to transmit updated docket sheets forthwith.
08/01/2001		Copy of #65 and updated docket sheets transmitted to Clerk of Appeals Court.
10/20/2003	14	Rescript received from Appeals Court; "Judgment AFFIRMED. Order denying Motion for new trial afformed [sic]." filed.

Possession Of Firearm, Not Home/Work, No License
INDICTMENT **C. 269, § 10(a)**
98-11521-001 **Fourth Offense**

Commonwealth of Massachusetts

SUFFOLK, SS.

At the SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT FOR CRIMINAL BUSINESS, begun and holden at the CITY OF BOSTON, within and for the County of Suffolk, on the first Monday of October in the year of our Lord one thousand nine hundred and ninety-eight.

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present that

MELVIN SMITH,

on August 16, 1996, did unlawfully, knowingly have in his possession, a firearm, to wit: a handgun, from which a bullet could be discharged, the length of the barrel of said firearm being less than sixteen inches, the said Melvin Smith not being present in his residence or place of business and without having in effect a license to carry firearms issued under § 31 or § 131F of c. 140 of the General Laws of Massachusetts and without complying with the provisions of § 129(c) and § 131(g) of said c. 140.

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present that

MELVIN SMITH,

on November 5, 1990, prior to the commission of the offense heretofore described in this indictment was convicted in the Suffolk Superior Court of the offense of

Unlawful Carrying Of Firearm, Docket # 090967, and this is therefore a second and subsequent such offense;

on November 5, 1990, prior to the commission of the offense heretofore described in this indictment was convicted in the Suffolk Superior Court of the offense of Unlawful Carrying Of Firearm, Docket #086496, and this is therefore a third and subsequent such offense;

on July 20, 1995, prior to the commission of the offense heretofore described in this indictment was convicted in the United States District Court of Massachusetts of the offense of Felon In Possession Of Firearm, Docket #95-10032-JLT, and this is therefore a fourth and subsequent such offense.

A TRUE BILL

/s/ John P. Puleo
Assistant District Attorney

/s/ [Illegible]
Foreman of the Grand Jury

Superior Court Department-Criminal Business
October, Sitting, 1998

Returned into said Superior Court by the Grand Jurors and ordered to be filed.

/s/ John A. Nucci
Clerk Of Court

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
NO. 96-11471, 98-11521
96-11797

COMMONWEALTH OF MASSACHUSETTS

v.

MELVIN T. SMITH (SUCR97-11471 and SUCR98-11521)
FELICIA BROWN (SUCR96-11797)

November 4, 1998
Before: Donovan, J.
Boston, Massachusetts
Day 2 – Trial

* * *

[Witness Christopher Robinson]

[67] second floor?

A Yes, sir.

Q All right. And what was your purpose in going down to the second floor?

A I was going into Tyrone's room.

Q And what were you going to do there?

A I was going to lie down.

Q Up to this point, had you had an argument with anybody in that home that evening?

MR. CARROLL: Objection.

THE COURT: Sustained.

A No, sir.

MR. CARROLL: Move to strike.

THE COURT: That may go out.

Q Were you having problems with anyone in the house at that time?

MR. CARROLL: Objection.

THE COURT: Sustained.

Q So what happened, sir, when you went down the stairs?

A As I approached – when I got to the last stair, the end of the staircase, to my left is Felicia's room. And I turned and I saw Melvin and Felicia standing at the end of her bed, and Melvin had a gun in his hand.

Q What kind of gun?

[68] A A pistol. It appeared to be a .32 or a .38.

Q So what happened?

A He started to fire.

Q Where was the gun pointed when he started to fire?

A About – at his waist, going up to his waist with his right hand.

Q And what happened to you?

A I just stood there. And I heard three shots. And after that, I heard nothing else. It was just like a ringing in my ears, a continuous ringing. I went into Tyrone's room as they passed through the door. As he finished

shooting, he said, "Let's go," and they left and slammed the door.

Q How much time was there between the first shot and the second shot?

A Continuously.

Q And the second and the third also?

A Yes, sir.

Q And where exactly were you at physically when Melvin shot you?

A In the hallway.

Q And again, referencing that chart, in the hallway, what were you close to? What part of that hallway were you in?

* * *

[108] THE COURT: It may.

(Photograph published to the jury.)

MR. PULEO: May I have moment, Judge?

THE COURT: You may.

(Brief pause.)

MR. PULEO: Thank you.

Q Mr. Robinson, you indicated that you believed that the pistol or handgun that you saw Mr. Smith have in his hand just seconds before he shot you was either a .32 or a .38?

A That is correct.

Q And on what did you base that estimate in your – in that part of your testimony?

A How did I come up with that conclusion?

Q Yes, sir.

A Because my father owns several handguns.

Q So you're familiar with handguns, generally?

A I'm very familiar with handguns.

Q Do you know the difference between an automatic handgun and a revolver?

A Yes, sir, I do.

Q And were you able to make observations of this handgun that Melvin Smith shot you with, to see whether it was an automatic or a revolver?

[109] A Yes, sir.

Q And which was it?

A It was a revolver.

Q You indicated earlier that you believed to be in the house at the time of the shooting not only Felicia Brown and Melvin Smith, but also a person that had been introduced to you by Melvin as his brother, James Smith?

A That's correct.

Q Besides what Melvin Smith told you about that person, did you know that person?

A No, sir.

Q Did you know, in fact, whether he was Melvin Smith's brother or not?

A No, sir.

Q Did you see that person in the seconds just before you got shot, when you came down at the bottom of the stairs on the second-floor hallway?

A Yes, sir.

Q And where was that person?

A He was standing to the – he was standing to the right of Felicia.

Q In Felicia's room?

A That's correct.

Q Did Detective Smith ever show you another group of photos

* * *

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
NO. 96-11471, 98-11521
96-11797

COMMONWEALTH OF MASSACHUSETTS

v.

MELVIN T. SMITH (SUCR97-11471 and SUCR98-11521)
FELICIA BROWN (SUCR96-11797)

November 5, 1998
Boston, Massachusetts
Before: Donovan, J.
Day 3 – Trial

* * *

[Witness Christopher Robinson]

[55] Q Are you a trained cook?

A A trained crook?

Q A cook. A cook. Have you had training in being a cook?

THE COURT: I think he means a chef.

A Yes.

Q I believe that you testified that the gun that you say was used was a .38 or a .32?

A That would be correct.

Q Okay. Is there a difference between a .38 and a .32?

A Not much.

Q What is the difference?

A The size.

Q Do you remember telling Mr. Anderson that you were sure that it was a .32?

A I remember telling Mr. Anderson that.

Q Do you remember saying that to him at your sworn testimony at the hospital on October 15th of '96?

A That it was not a .22, that it had to be a .32 or a .38.

Q Well, do you remember telling him that you were sure it was a .32?

A I told him it had to be a .32 or a .38.

MR. TOBIN: May I approach, your Honor?

THE COURT: You may.

Q Mr. Robinson, could you please take a look at this Page

* * *

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
NO. 96-11471, 98-11521
96-11797

COMMONWEALTH OF MASSACHUSETTS

v.

MELVIN T. SMITH
(SUCR96-11471 AND SUCR98-11521)
FELICIA BROWN (SUCR96-11797)

November 12, 1998
Boston, Massachusetts
Before: Donovan, J.
Day 6 – Trial/Charge

* * *

[63] THE COURT: In addition, he's contesting the Yellow Pages as the basis of – I'm going to exclude it.

MR. PULEO: Could I just be heard on it?

THE COURT: The offer of proof is on here.

MR. PULEO: I'm sorry.

THE COURT: The offer of proof is already on here, on the record, and it indicates what you're using as a basis for your offer.

MR. PULEO: But my point about the daylight savings time, I'm not asking the Court to take any judicial notice of –

THE COURT: But that would affect – that could affect her testimony, as to the hour differential. I guess you'll have to stay with what you have.

MR. PULEO: It's a fairer argument, I think, but it has nothing to do whether it's a fact that's appropriate for judicial notice or not.

THE COURT: Well, there are several bases for excluding it. Anything else?

MR. PULEO: No.

THE COURT: Do you rest?

MR. PULEO: Yes.

THE COURT: Gentlemen, Mr. Tobin.

THE CLERK: That photograph, was that decided [64] on?

THE COURT: What about that photograph, the photograph of Mr. Smith?

MR. PULEO: That's already been received as an exhibit, and it's up to the Court to –

THE COURT: So we're just going to substitute the numbers.

MR. PULEO: Right. And earlier in the lobby – since we're on the record now, we can complete the brief discussion we had in the lobby relative to that. What will now be Exhibit –

THE CLERK: – twenty-eight.

MR. PULEO: Twenty-eight. Thank you. We've agreed to – the only disagreement is whether the date of

8/30/96 can be included on the exhibit or not. I'm requesting that it is, because that was information that is not prejudicial and consistent with the testimony –

THE COURT: Well, you could argue that – you can argue that to the jury, that the date was the date that the officer said. I'm going to exclude any date notation on that.

Do you people have, now that Mr. Puleo has finished with all of his evidence and now he's rested, and we'll do it formally in front of the jury, but do you [65] people have anything that –

MR. CARROLL: I do. I'd like to bring it up.

THE COURT: Okay.

MR. TOBIN: I have also.

THE COURT: Mr. Puleo, with respect to Mr. Smith's motion for a required finding of not guilty on the firearm charge, possession of a firearm, do you wish to address that?

MR. PULEO: Yes, briefly, if I may.

THE COURT: Yes. Part one deals with the portion of the statute wherein you have to prove the length of the barrel.

MR. PULEO: I think Mr. Robinson's testimony about the description of the gun was, variously, either a hangun [sic] or a pistol. Mr. Robinson testified that he was familiar with guns because of his father's experience – I don't know if it was in the military, or what it was. And while Mr. Robinson was not asked a direct question about the length of the barrel, I think that those terms as used

by Mr. Robinson, given his level of familiarity, if not quasi-expertise of handgun and pistol, satisfy –

THE COURT: Well, it's the jury that has to make the finding of fact that you've established that, not based upon what Mr. Robinson says is a pistol or a [66] handgun. I mean, the jury has to make a finding.

MR. PULEO: And I think this jury, viewing this evidence in the light most favorable to the Commonwealth, would be warranted in finding that the –

THE COURT: How can they find the length of the barrel?

MR. PULEO: Because there's –

THE COURT: There's not a scintilla of evidence on that.

MR. PULEO: Because Mr. Robinson's testimony that it was a pistol, I think he even said a small pistol, or a handgun, allows for a reasonable inference that the barrel of a pistol or a handgun is not longer than eighteen inches.

THE COURT: Sixteen.

MR. CARROLL: Sixteen.

MR. PULEO: Sixteen inches. I'm sorry.

THE COURT: No, I don't think that there is a basis in which a jury, based upon Mr. Robinson's testimony alone, can conclude that a pistol or a revolver has a barrel length of sixteen inches or less.

MR. PULEO: Well, given that, if that's the Court's interpretation of Mr. Robinson's testimony, then I

will be requesting to reopen and allow Mr. Robinson to [67] testify to that.

THE COURT: Well, this is the time in which they are moving for a required finding of not guilty. I'm going to allow it on the firearm charge.

MR. CARROLL: Your Honor, as to the other two charges, I would argue –

THE COURT: I'm going to deny it with respect to the other two. And I'm going to deny Ms. Brown's, with respect to an accessory.

(End of side-bar conference.)

THE COURT: Mr. Puleo, any further evidence from the Commonwealth?

MR. PULEO: No. At this point, the Commonwealth rests their case.

THE COURT: All right.

MR. PULEO: Thank you.

THE COURT: Mr. Tobin, do you wish to go forward?

MR. TOBIN: Yes, I call Patricia Brown, please.

PATRICIA BROWN, SWORN
[68] DIRECT EXAMINATION

Q (by Mr. Tobin) Good morning. Could you state your name, please, for the Court and the jury?

A Yes. Patricia Brown.

Q And where do you live, Ms. Brown?

A 1019 Beacon Street, Brookline, Mass.

Q Okay. And briefly, what's your education?

A I'm a nurse's aide.

Q Are you employed?

A Yes.

Q And what's your employment?

A I do private-duty nursing.

Q Okay.

THE COURT: I think you'll have to keep your voice a little bit louder so everyone can hear you.

Q Do you know Felicia Brown?

A Yes, I do.

Q All right. And what is your relationship, if any, to Felicia Brown?

A I'm her mother.

Q Do you know Christopher Robinson?

A Yes, I do.

Q What is your relationship, if any, to Christopher Robinson?

[69] A I'm his aunt.

Q Directing your attention to August of 1996, a little over two years ago, where were you living at that time?

A 33 Lawn Street, Roxbury; Boston, Mass.

Q Okay. And where in the house was your bedroom at that time?

A I had a two-floor apartment. I was on the third floor.

Q Okay. Was anybody else on the third floor with you?

A No.

Q Were you married at that time?

A Yes.

Q Okay. Was there a man named Romanis Charles that lived in the house?

A Yes.

Q What room did he stay in in the house?

A My bedroom.

Q Did you stay also in that room?

A Yes.

Q In August '96?

A Yes.

Q Did anybody else stay on the third floor in August of '96?

A No.

Q Were there bedrooms on the second floor?

[70] A Yes, there were.

Q Okay. Whose bedrooms are on the second floor?

A My three children.

Q Okay. And one is Felicia?

A Yes.

Q And how old was Felicia in August of 1996?

A Approximately seventeen.

Q Okay. And her bedroom was on the second floor?

A Yes.

Q All right. Did she share that bedroom with anybody else?

A Yes.

Q Who?

A My daughter Stephanie.

Q Okay. How old was Stephanie in 1996, approximately?

A She was about twelve.

Q Okay. Besides Felicia and Stephanie staying in the one room, did anybody else have a bedroom on the second floor in your house?

A Yes. My son, Tyrone Brown.

Q How old was Tyrone in August of '96?

A He was about thirteen.

Q Directing your attention to August of 1996, did you have occasion to take a trip?

A Yes, I did.

[71] Q All right. Where did you go?

A I went to Alabama.

Q All right. And why did you go to Alabama?

A My nephew wanted me to go with him on a trip, to take his daughter to Disney World.

Q Okay. Did you have family, relatives, down in Alabama?

A Yes, I did.

Q Okay. At some point while you were in Alabama, did you become aware that your nephew Christopher had been shot?

A Yes, I did.

Q How long had you been in Alabama at that time?

A Approximately two days.

Q When had you left Boston?

A That Tuesday before that Friday.

Q Okay. When had you last spent the night at 33 Lawn Street before you heard that news?

A The Monday before that Tuesday.

Q So if Friday was August 16th, you last stayed at 33 Lawn Street on Monday, August 12th?

A Yes.

Q Or thereabouts. Prior to your leaving to go to Alabama, was your nephew Christopher Robinson in Boston, Massachusetts?

A Yes, he were.

[72] Q Okay. Do you know – strike that.

Did you have anybody else living in the house besides the people that you mentioned already?

A Yes, I did.

Q Okay. Who else was living in the house?

A My nephew was there, for a couple of days, maybe.

Q Chris?

A Yes.

Q Okay. What about the first floor?

A Yes, there was other people living there.

Q Were they tenants?

A Yes.

Q Okay. Do you remember their names?

A Yes.

Q Who were they?

A Patrick Verdieu, and Peter.

Q What apartment did they live in?

A The first-floor apartment.

Q Okay. Besides Patrick Verdieu and Peter, was there any other tenants in the house?

A Yes.

Q Who else?

A There was two ladies on the second floor.

Q Okay. Now, directing your attention to approximately two [73] weeks before you left to go to Alabama, did you witness something unusual happen in your house regarding Christopher Robinson and Patrick Verdieu?

A Yes.

Q Okay. When was that in relation to the time that you went down South, approximately?

A About a week, maybe.

Q A week prior?

A Yes.

Q Okay. And where was this?

A It was on the third floor of our apartment, in my living room.

Q Okay. What time of day or night was this?

A It was in the afternoon. Around two or three o'clock, I'd say.

Q Okay. And who else was present, if anyone, besides yourself, Christopher Robinson and Patrick Verdieu?

A Maybe Stephanie was around.

Q And what did you observe at that time?

A A very bad argument went on in the house.

Q Between who?

A Patrick and Christopher Robinson.

Q Okay. And what was the content of the argument?

A Well, Patrick had – I had bought some beer and Patrick [74] took it to his apartment, which I bought it for the two of them. And I assumed that Chris –

MR. PULEO: I object.

THE COURT: Sustained.

Q Only what you saw at that time.

A Well, they wanted to fight over the beer, because –

MR. PULEO: Objection.

THE COURT: Sustained.

MR. TOBIN: May we approach, your Honor?

THE COURT: Yes.

SIDE-BAR CONFERENCE:

MR. TOBIN: I'm just trying to understand the basis of the objection, if it's relevance or if it's the form of the question.

THE COURT: Well, I'm sure there's several bases. But he's objected and I sustained the objection.

MR. TOBIN: Okay. Could I be heard on relevance?

THE COURT: I don't think it's necessary.

(Brief pause.)

MR. TOBIN: The offer of proof I would make would be, if allowed to answer the question, she'd testify about a heated argument between these two people wherein each threatened bodily harm on the other.

[75] THE COURT: Okay.

(End of side-bar conference.)

Q At the time that you're talking about, did you observe the demeanor of Chris Robinson and Patrick Verdieu?

A Yes.

Q What was the demeanor of each?

A Patrick said –

MR. PULEO: Objection.

THE COURT: The objection's overruled. Just their demeanor, their appearance.

A They wanted to fight.

MR. PULEO: Objection. Move to strike.

THE COURT: No. That's already been testified to.

Q Do you recall exactly what Patrick said to Chris and Chris said to Patrick?

A Yes.

Q What did Patrick Verdieu say to Chris?

MR. PULEO: Objection.

THE COURT: The objection's overruled.

A He said that he was going to rip him into pieces if he came back to his apartment to get some beer.

Q And what did Chris say to Patrick?

[76] MR. PULEO: Objection.

THE COURT: The objection's overruled.

A That he was going to come downstairs and hit him with a lock and chain while he's sleeping and burn up his car.

Q Now, at the time you were in Alabama, before you became aware that Chris had been shot, What was your relationship like – strike that.

Do you know Belinda Carter?

A Yes, I do.

Q What is your relationship to Belinda Carter?

A I'm her aunt.

Q I'm sorry?

A I'm her aunt.

Q You're her aunt?

A Yes.

Q Before you got the news that Chris had been shot, could you describe your relationship between yourself and Belinda Carter?

A Well, we were very close.

Q At some point after you got the news that Chris had been shot, did that relationship change at all for a period of time?

A Yes, it did.

Q Okay. Generally, how did it change?

[77] A Well, it was just that they didn't want to have anything to do with my daughter or me.

Q Okay. After you got the word that Chris had been shot, at some point did you come back up to Boston?

A Yes, I did.

Q Okay. Do you remember when that was?

A Two weeks later.

Q Okay. Did you go to 33 Lawn Street?

A Yes, I did.

Q All right. Did you go inside your house?

A Yes, I did.

Q Okay. Did you see anything with regard to the physical condition of 33 Lawn Street that was different from when you had left to go to Alabama?

MR. PULEO: Objection.

THE COURT: The objection's overruled.

A Yes, I did.

Q Okay. What did you see that was different?

A Some items had been broken and the door had been broken.

Q Okay. When you say the door, the door to whose room?

A Tyrone's room.

MR. TOBIN: May I approach, your Honor?

THE COURT: You may.

Q Ms. Brown, with the Court's permission, I'd like to show [78] you a photograph which has been marked as Exhibit 2. I'd ask you to take a look at that and tell us, if you can, what that picture depicts.

A The door was not broken like that when I left.

Q Just tell us, what does the picture depict that you're looking at?

A I see where blood is on the bed.

Q Okay. But what room is it?

A It's in Tyrone's room.

Q Okay. Could you hold it up for the jury, please, and show them?

THE COURT: If you could just step out of the way a little bit so the jurors can see. Thank you.

Q Does that photograph depict the door to Tyrone's bedroom as it was when you came back from Alabama?

A When I came back? It was taken down.

Q It was completely down by that time?

A Yes.

Q Okay. So –

MR. PULEO: Excuse me, Mr. Tobin. I'm going to object and move to strike her previous testimony, then.

THE COURT: You've got to lay a foundation. I'll sustain the objection and strike the testimony with regard to the door.

[79] Q Before, you testified that you left 33 Lawn Street to go to Alabama on the Monday before August 16, correct?

A Yes.

Q Okay. Tell the jury, at the time you left, what was the – did Tyrone's bedroom have a door?

A Yes, it did.

Q Okay. What was the condition of the door at the time?

A The door was perfect.

Q Okay. It was a full door?

A Yes.

Q All right. When did you next see Tyrone Brown's bedroom after you left for Alabama?

A The day before I left.

Q No. After you left.

A When I came back to Boston.

Q When you came back. And at that time, what did you observe as to Tyrone Brown's bedroom with regard to a door or a doorway?

A There was nothing there.

Q There was nothing there. When you came back from Alabama, did you notice if any items that were in the house when you left to go down were now missing or broken?

A Yes.

[80] Q What items?

A A pink vase and a telephone.

Q Okay. With regard to the pink vase, when you left to go down to Alabama, where was the pink vase located?

A Usually I had it sitting right in the hallway.

Q On which floor?

A The second floor.

Q All right. And when you came back from Alabama, did you see the pink vase in the hallway?

A No, I didn't.

Q All right. To this day, have you ever seen the pink vase again?

A No, I haven't.

Q You mentioned a telephone. What room was the telephone in?

A Well, usually we take it from floor to floor.

Q When you left to go to Alabama, what room was the telephone in at that time, if you remember?

A The second floor.

Q Okay. Do you remember which room?

A Felicia's room.

Q Okay. When you came back from Alabama, did you see the telephone?

A Yes, I did.

[81] Q Where was the telephone at the time you first saw it when you came back from Alabama?

A In Tyrone's room.

Q Okay. What was the condition of the telephone at that time?

A It was broken.

Q Broken?

A Yes.

Q While you were in Alabama, before you came back up after getting the word that Chris was shot, did you at anytime have a three-way telephone conversation with your daughter Felicia and your niece Belinda Carter?

A No, I didn't.

Q You did not?

A No.

MR. TOBIN: Your Honor, may we please approach, briefly?

SIDE-BAR CONFERENCE:

MR. TOBIN: Your Honor, I would like to ask Ms. Brown with regard to a conversation that my client had with the district attorney when she was subpoenaed to the Grand Jury, with regard to whether or not she was read any rights. And the reason I do that is, again, on [82] the issue of voluntariness. I understand that the Court has accepted Judge Connolly's judgment that the court rules that the statement is voluntary. But under the humane practice, it's my understanding that the jury makes – has to make that decision, and I do need to put in evidence of involuntariness for them to make that decision.

It would be my position that she's seventeen years old, compelled by subpoena, had two rights that were certainly available to her, namely, the privilege against self-incrimination, not full Mirandas, the privilege against self-incrimination, and the statutory right to counsel. And the fact that given her age and that she had those rights and that she had already told them that she had left the house with Melvin Smith, who had already been identified as the shooter, clearly they knew that she was going [sic] incriminate herself. And they also had knowledge that, according to their view of the case, she was going to perjure herself. And they never told her about any of these rights and I think it's something the jury should hear.

THE COURT: But Judge Connolly already ruled that she wasn't entitled to any rights at the Grand Jury stage, so I'm going to exclude any questions regarding [83] that. I mean, you can ask her questions, obviously, about the age of your client at the time and her awareness of things, and so on and so forth.

MR. TOBIN: Could I just say, Judge Connolly cited the *Guilliard* case to say she wasn't entitled to Mirandas, and I agree that she wasn't entitled to Mirandas, but it is an open question on the issue of whether she's entitled to be told of her limited privilege not to incriminate herself.

THE COURT: Judge Connolly's decision stands.

MR. TOBIN: Okay.

(End of side-bar conference.)

Q Ms. Brown, I have no further questions for you at this time. Other attorneys are going to ask you some questions.

A Thank you.

THE COURT: Mr. Carroll, do you have any questions?

MR. CARROLL: Yes, Judge, I do.

CROSS-EXAMINATION

Q (by Mr. Carroll) Good morning, Ms. Brown. I'm Bruce [84] Carroll.

Ms. Brown, you indicated in response to Mr. Tobin's questions that about a week before you left you observed an argument between Chris Robinson and Patrick Verdieu; is that correct?

A Yes.

Q And in that argument, Patrick Verdieu told Chris Robinson he was going to break Chris into pieces. Is that what you said?

A Yes.

Q Did he say anything else after that?

A Yes, he did.

Q What else did he say?

A Quite a few things. I don't remember.

Q Do you remember what the tone of voice was when he said the other things?

A He was very angry.

Q Was he threatening Chris?

A Yes.

Q And Chris responded to Patrick; is that right?

A Yes, he did.

Q And he said that he was going to come down with his lock and chain. Is that what you said?

A Yes.

[85] Q And what lock and chain is that, Ms. Brown?

A I don't know.

Q Does Chris have a lock and chain?

A I'm not sure.

Q Have you ever seen a lock and chain?

A No.

Q But he said he was going to come down while Patrick was asleep?

A Yes.

Q And get him with his lock and chain?

A Yes.

Q And he said he was going to burn up – Chris said he was going burn up Patrick's car, correct?

A Yes.

Q Did you hear Chris say anything else about what he was going to do to Patrick?

A No.

MR. CARROLL: May I approach the witness, Judge?

THE COURT: You may.

Q Ms. Brown, I'm showing you a couple of photographs that have already been introduced into evidence. They're Exhibit Numbers 2 and 7. Do you see those?

A Yes.

[86] Q And it's fair to say those are pictures of the interior area of 33 Lawn Street on the Second floor?

A Yes.

Q And it's fair to say that Exhibit 2, which Mr. Tobin showed you, is a picture looking from the hallway into Tyrone's room?

A Yes.

Q And the other picture, Number 7, is a picture looking from Tyrone's room outside into the hallway, correct?

A Yes.

Q I want to direct your attention, but I'm going to show it to you and to the members of the jury, to various objects that are on the floor in Exhibit 2. And again, in Picture 7, a different view, with some other objects. Can you see those objects on the floor in those two pictures?

A Yes.

Q Is that the color of the pink vase that had been up in that second-floor hallway?

MR. PULEO: Object to the form of the question.

THE COURT: Sustained.

Q Do you recognize the color of those pieces?

A Yes I do.

Q And what do you recognize the color of that to be?

[87] A The vase.

Q Are those pieces consistent with the pink vase that was in the second-floor hallway?

A Yes.

Q And that's the pink vase you haven't seen since you left for Alabama?

A Right.

Q Did you make any observations of the walls down there on the second floor when you returned from Alabama?

A Yes, I did.

Q And did you notice anything different about the condition of the walls when you returned from Alabama?

A Yes, I did.

Q And what was different?

A There was, like, large holes in the wall.

Q And what did you have to do – where were those holes in the wall?

A In Tyrone's bedroom.

Q I'm sorry?

A In Tyrone's bedroom.

Q And what did you with the holes in the wall?

A I just had them fixed.

Q Thank you, Ms. Brown.

THE COURT: Cross-examination, Mr. Puelo [sic]?

[88] MR. PULEO: Thank you.

CROSS-EXAMINATION

Q (by Mr. Puleo) Good morning, Ms. Brown.

A Good morning.

Q You were down in Alabama and you learned that your nephew Chris Robinson was shot in your home at 33 Lawn Street, correct?

A Would you repeat that?

Q You were down in Alabama, to take a family – go on some family trip to Disney World –

A Yes.

Q – when you learned that your nephew Christopher Robinson had been shot in your home in Boston at 33 Lawn Street, correct?

A Yes.

Q After you learned that that happened, how long was it before you returned to Massachusetts?

A About two weeks.

Q Did you still go to Disney World, ma'am?

A I didn't go. I was in Alabama.

Q Was there something special about this pink vase?

A No, there wasn't.

[89] Q Did it have any sentimental value to you, ma'am?

A No, it didn't.

Q And when you returned home two weeks after learning that someone was shot in your home, you noticed that a pink vase was missing?

A I knew it before I returned home.

Q You knew about it before you returned home?

A Yes, I did.

Q That it would be missing?

A It didn't really matter.

Q The pink vase didn't really matter, did it?

A No, it did not.

Q You said that in August of 1996 your daughter Felicia Brown was how old?

A Approximately seventeen.

Q And when was she going to turn eighteen?

A When was she going to turn eighteen?

Q Yes, ma'am.

A September 29th.

Q The next month. She was a month short of eighteen, right.

A Yes.

Q Do you recall when it was when you first talked to Tony Smith, the detective on this case?

[90] A Yes, I do.

Q When was that?

A The very same day Chris Robinson got shot.

Q And you were in Alabama?

A Yes, I were [sic].

Q So I take it this was a telephone conversation?

A Yes, it were [sic].

Q All right. And did you tell Detective Smith about this argument that you had witnessed a couple of weeks before with Mr. Robinson and Mr. Verdieu?

A Yes, I did.

Q You did. When you returned to 33 Lawn Street, was Mr. Verdieu still a tenant in your home?

A Yes he were [sic].

Q How long after August 16th of '96 did Mr. Verdieu continue to rent at the first-floor apartment of 33 Lawn Street?

A About a year and a half, maybe.

Q And this argument between Mr. Robinson and Mr. Verdieu, I think your testimony was, was a couple of weeks before the 16th.

A Maybe about a week before the 16th.

Q All right. And you had made arrangements with Chris to stay at your home while you were in Alabama, correct?

[91] A No, I didn't.

Q Were you aware that Chris was making arrangements with anyone to stay at your home?

A No, I didn't.

Q Did you have any reason to believe Chris was going to be staying at your home?

A No, I didn't.

Q Did you ever tell your daughter Felicia that you had made arrangements for Chris to come and watch the house while you were in Alabama?

A I could have told her that he was going to be coming by to check the house every once in a while.

Q Well, why would you tell your daughter Felicia Brown that your nephew Chris would be coming by if, in fact, you didn't expect him to be coming by, because you had not made any arrangements for him to come by?

A I told her over the phone.

Q But your testimony is that you made no arrangements for Chris to come by to check on the house, correct?

MR. CARROLL: Objection, your Honor.

THE COURT: The objection's overruled.

A Not to check the house, no.

Q So then why did you tell your daughter Felicia, "Chris will be coming by to check the house while I'm gone"?

[92] A I don't know if I told her that. It's been two years now. Maybe I did or maybe I didn't.

Q Is there any – can you fathom a reason in the universe, ma'am, why you would tell her that if it's not something that was in your head?

MR. CARROLL: Objection.

THE COURT: Sustained.

A Well, my husband was there –

THE COURT: I sustained the objection. He'll put another question to you.

Q Did you ever tell your husband, Romanis Charles, that Chris would be staying at the house, helping out with chores, while you were in Alabama?

A No, I didn't.

Q After this argument between Mr. Verdieu and Mr. Robinson approximately a week – was it a week before Chris was shot or the week before you left for Alabama?

MR. CARROLL: Objection, your Honor.

A About a week.

THE COURT: The objection's overruled.

Q I'm sorry?

A About a week before I left.

Q Before you left. And you left maybe that Tuesday of that week?

[93] A Right.

Q And after the argument, but before you left, did you ever see Chris at 33 Lawn Street again?

A Yes, I did.

Q And after the argument, but before you left, did you ever see Chris at 33 Lawn Street again?

A Yes, I did.

Q And was Patrick Verdieu ever there during that week that you saw Chris there?

A Patrick was working. I didn't see him that much.

Q How often did you see Mr. Robinson for that week after the argument with Mr. Verdieu but before you left for Alabama?

A Maybe two or three times.

Q Did you make any attempt to prevent Mr. Robinson from coming by 33 Lawn Street during that week?

MR. CARROLL: Objection.

THE COURT: The objection's overruled.

A Did I prevent him from coming by?

Q Did you make any attempt to prevent him from coming by your house?

A No, I didn't.

Q You didn't think that Chris was going to set Mr. Verdieu's car on fire, did you?

MR. CARROLL: Objection.

THE COURT: Sustained.

Q Do you remember meeting Detective Smith once you did [94] return to Boston approximately two weeks after the shooting?

A Yes.

Q Incidentally, if you didn't go to Disney World, what did you do down in Alabama for two weeks before you returned here?

MR. CARROLL: Objection.

THE COURT: The objection's overruled.

A What did I do?

Q Yes, ma'am.

A Mostly waited around to see if he was going to be all right.

MR. CARROLL: Objection, your Honor.

THE COURT: The objection's overruled.

MR. CARROLL: May we approach?

(Brief pause.)

MR. PULEO: Mr. Carroll –

THE COURT: Oh, I'm sorry.

MR. PULEO: – requested to approach side-bar, Judge.

MR. CARROLL: May we approach?

SIDE-BAR CONFERENCE:

THE COURT: I overruled your objection. What [95] was the basis of it? What did you want to see me at side-bar for?

MR. CARROLL: Well, what I'm expecting the answer may well be, Judge, is that she waited around to see if Chris was going to die. And I don't that that's probative, and certainly it's much more prejudicial –

THE COURT: No, no.

MR. TOBIN: She expected that he was going to die and that the body was going to go back down there for burial and that's why she waited.

THE COURT: All right. Go on to something else, then.

MR. PULEO: Sure.

(End of side-bar conference.)

Q Ms. Brown, you said you came back to Massachusetts approximately two weeks after you learned that Chris had been shot?

A That's right.

Q And did there come a time, after your return to this state, that you and Detective Tony Smith and your daughter Felicia Brown had a conversation?

A Yes.

Q Do you recall where that conversation took place?

[96] A Yes.

Q Where was that?

A At my home, 33 Lawn Street.

Q And do you recall Felicia Brown telling Detective Smith at that time that she didn't know where the shots were coming from?

A Yes, I remember.

Q Okay. And do you recall telling Felicia, "Felicia, you should know what floor the shots were coming from"?

MR. CARROLL: Objection.

MR. TOBIN: Objection.

THE COURT: Sustained.

Q Do you recall what you said, if anything, to Felicia while Detective Smith was interviewing her?

MR. TOBIN: Objection.

THE COURT: I'll see counsel at side-bar.

SIDE-BAR CONFERENCE:

THE COURT: On what basis would her statement to her daughter be admissible?

MR. PULEO: Just, if, in fact, she made the statement during that interview.

THE COURT: Well, you have to have some basis for offering an out-of-court statement. She says to her [97] daughter, you know, I think one of the things was, "Tell the truth," or whatever. You know, you have to have some basis for offering that statement.

MR. PULEO: I'm not offering – I would submit that it's not hearsay, because I'm not offering it to prove the truth of anything asserted –

THE COURT: Well, what are you offering it for?

MR. PULEO: As a matter of fact, I don't even think it's assertion.

THE COURT: What are you offering for?

MR. PULEO: Just to show that the witness is –

THE COURT: That she made the statements?

MR. PULEO: Yes.

THE COURT: No. You still have to have a basis for introducing the statement.

MR. PULEO: Well, her impressions of her daughter's statement, I think, are relevant to her credibility as a witness.

THE COURT: I'll exclude it.

MR. PULEO: Thank you.

(End of side-bar conference.)

Q Ms. Brown, do you remember where in Tyrone's room the holes in the wall were that were not there when you left [98] for Alabama but were there upon your return?

A From the window of his bedroom, on the right side.

Q On the wall where the windows were?

A Yes. And on the left side.

Q On the right side of the windows?

A No. The side of the bed.

Q Okay, the side of the bed. Is there a window on that side of the bed?

A The side of the bed there's a window.

Q And was the damage somewhere near the window that was on that wall?

A Yes.

Q Do you recall where?

A Up in the center.

Q In the center of what, please?

A The wall from the – from the window to the closet. And there was another hole in the wall from the – near the dresser.

Q And there was another hole in the wall near the dresser?

A Yes.

Q Are there windows on that wall?

A No, it isn't.

Q Is that the dresser that your son Tyrone had some stereo/electronic equipment?

[99] A Yes.

MR. PULEO: May I approach the witness, Judge?

THE COURT: You may.

Q Ma'am, let me hand you Exhibit Number 3, please. And can you identify what's shown in that photograph?

A Yes.

Q Is that a picture of Tyrone's room?

A Yes, it is.

Q Can you see the window that's on the wall, on the side of the bed?

A Yes.

Q Can you hold up that photograph so the jury can see it, please, and point to the hole that you've testified about in that photograph.

A The hole is somewhere near – further up, near the window. This is the window, this is the wall here. And the room is kind of long, so it's somewhere between the bed and the closet.

Q So it's not shown in that photograph, is it?

A No, it isn't.

Q How about Exhibit Number 5, ma'am, can you tell us what that's a picture of?

A Yes.

Q Is that the wall on the side of the bed, going to the [100] closet, that you just told us about?

A Yes, it is.

Q Can you hold that picture up and can you – is there anywhere on that photograph that shows the hole that you're talking about, ma'am?

A No, it isn't.

Q That photo doesn't show any damage, either, to the wall, does it?

(No verbal response.)

THE COURT: Do we have an answer to that? The question was, that doesn't show any –

THE WITNESS: No, it doesn't.

THE COURT: All right.

Q And Exhibit Number 4, ma'am, is that a photograph of the dresser that had Tyrone's stereo equipment on it?

A Yes, it is.

Q Is the hole that was on the wall behind the dresser shown in that photograph?

A No, it isn't.

Q How about Exhibit Number 16, is that a photograph of the rest of that wall with the dresser with the stereo it had been against?

A Yes.

Q And does that photograph show damage in the wall that [101] you've testified to?

A No, it does not.

Q And where is the damage on the wall that the dresser and stereo were against?

A I'm not sure if the hole was fixed before these pictures was taken.

Q Maybe the hole was fixed by the time these pictures were taken?

A Maybe.

MR. PULEO: I don't have any other questions of this witness.

THE COURT: Any redirect, Mr. Tobin?

MR. TOBIN: Yes, your Honor.

REDIRECT EXAMINATION

Q (by Mr. Tobin) Ma'am, in August of 1996, was your nephew Chris welcome in your house?

A Yes, he were.

Q Was he welcome in your house any time?

A Yes.

Q To stay over if he wanted?

A Yes.

MR. TOBIN: Thank you. That's all I have.

[102] THE COURT: Mr. Carroll.

RECROSS EXAMINATION

Q (by Mr. Carroll) Ms. Brown, Exhibit Number 16 is a photograph of Tyrone's room. Can you show the jury and the Court roughly the area where the damage was done? If the damage is even in the area depicted in that photograph. Was there damage done in the area depicted in that photograph, that you remember?

A I believe it was somewhere –

Q I'm sorry?

A I think it was somewhere in this area.

Q And you're pointing to the photograph and sort of showing the area between – to the right of the TV; is that right?

A Yes.

Q And it's a very narrow space in there?

A Yes, it is.

Q I'm going to show you two other pictures that Mr. Puleo showed you, Exhibits 3 and 5. They show that other wall, correct? Or at least parts of that other wall where the damage was done, correct?

A Yes.

[103] Q Do either one of those pictures depict the area where the damage was done?

A No.

Q And that's a fairly big wall, right?

A Yes.

MR. PULEO: Objection.

THE COURT: Sustained.

Q What's the size of that wall?

A It's –

Q Well, can you describe it as big, or small, or medium, or anything of that nature?

MR. PULEO: I object.

THE COURT: Maybe the length of it.

Q Can you give us the length of that wall?

A That wall is about – maybe 36.

Q I'm sorry?

A It may be about 36.

Q Thirty-six what?

A From the bed to the closet.

Q Thirty-six . . . ?

A Long.

Q And how about the height?

A Maybe about 82.

Q Are you talking inches, or feet, or what?

[104] A Inches.

Q And in those two pictures, Exhibits 3 and 5, how much of that wall is actually seen in those two pictures? What portions of wall, do you know?

A Very little.

MR. CARROLL: Thank you. That's all I have.

THE COURT: Anything further, Mr. Puleo?

MR. PULEO: No.

THE COURT: Thank you. You may step down.

THE WITNESS: Thank you.

(Witness excused.)

THE COURT: Mr. Tobin?

MR. TOBIN: The defendant Felicia Brown rests, your Honor, at this time.

THE COURT: Mr. Carroll?

MR. CARROLL: May I have a minute, please, Judge?

THE COURT: You may.

(Brief pause.)

MR. CARROLL: Defendant Melvin Smith rests, your Honor.

THE COURT: All right. Members of the jury, all of the evidence has been concluded. What we're going to do is take our morning recess, and then we'll resume and [105] have final arguments and I'll instruct you on the law and we'll send you out to deliberate the case.

In the meantime, remember my instruction that you're not to discuss the case among yourselves.

COURT OFFICER: All rise. Jurors, please step this way.

(Jurors exit at 11:31 a.m.)

THE COURT: Counsel, with respect to the general charge, I understand, Mr. Tobin, you're asking for a charge on humane practice as to the statement that your client made to Detective Smith and also to the grand jury; is that correct?

MR. TOBIN: Yes, your Honor.

THE COURT: All right. I'll give that instruction.

MR. TOBIN: Could I also just file a motion, Judge, for a required finding after the close of all of the evidence?

THE COURT: Certainly.

MR. CARROLL: I'd like to renew my motion as well, your Honor.

THE COURT: Okay. Both motions are denied.

Now, with respect to your client not testifying, do you wish an instruction?

[106] MR. TOBIN: Yes, Judge.

THE COURT: All right. Let me turn to Mr. Carroll. Do you wish an instruction?

MR. CARROLL: I request the same instruction, your Honor.

THE COURT: Okay. I'll also give an instruction with respect to the photographs which have been referred to at various times during the testimony of witnesses. And I will tell the jury, as I told them before, that there are many reasons why the police would have photographs and they're not even to – not to draw any adverse inference or even discuss it.

I will charge them on prior convictions. We have prior convictions as to Mr. Robinson and they can use that on the issue of his credibility.

And I will give the instruction on identification, based upon *Cuffie* and modified by *Santoli*. And I also will add to it the fact that sometimes people can make a good-faith mistake in an identification.

MR. CARROLL: Can the Court add some maybe – I don't know if this should be part of the identification instruction, but perhaps a credibility instruction, the ingestion of controlled substances and alcohol as it –

[107] THE COURT: I'll leave that up to you people to argue that to the jury.

MR. CARROLL: But I'd like to request such an instruction.

THE COURT: I'm going to leave that up to argument. There'll be no second instruction on that.

All right. Anything that any counsel wish to add with respect to the general instructions?

MR. PULEO: Just that it's the Commonwealth's position that the *Cuffie* instruction supplemented with *Santoli* is appropriate and the Court ought not to go any further than that about a good-faith mistake.

THE COURT: All right.

MR. CARROLL: Judge, I haven't prepared these, and I think the Court has them probably, but if the Court could remind the jury again about what the function of counsel is.

THE COURT: Oh, I do. That's part of my general instructions.

MR. CARROLL: That's my memory. I just want to make sure that it's on the record. And also remind the jury about motions to strike, the effect of striking the evidence. I'd also request an instruction on prior inconsistent statements.

[108] THE COURT: I give that, too.

MR. CARROLL: I anticipated that, Judge, but I just wanted to make sure we're covering our bases here.

THE COURT: All right. And also bias and all of those other issues. Reasonable doubt is included in the package.

Now, the next will be the substantive law. We have two indictments with respect to Mr. Smith; armed assault with intent to murder. And I will tell the jury that there are three elements the Commonwealth must prove. First, that Mr. Smith assaulted Mr. Robinson; second, that he had the specific intent to cause the death of Mr. Robinson; and third, that the assault was committed with a dangerous weapon.

We have discussed in chambers earlier this morning the lesser-included offense of assault with intent to kill, being that the Commonwealth must prove that there were no mitigating circumstances, and so I will instruct them on the lesser-included of assault with intent to kill.

MR. PULEO: While being armed. I'm sorry –

THE COURT: Oh, yes, while being armed, definitely.

MR. PULEO: Thank you.

[109] THE COURT: Yes. Anything, Mr. Puleo, you wish to add to that?

MR. PULEO: No.

THE COURT: Mr. Carroll?

MR. CARROLL: No, your Honor.

THE COURT: Okay. Then we have the next indictment of assault and battery by means of a dangerous weapon. I'm going to, in the initial armed assault with

intent to murder, define for them what is an assault, and I'll further that by saying we'll take those two definitions – there are two ways of committing an assault, and to constitute an assault and battery, that means that there is an unpermitted touching in addition to the assault, and furthermore, it was done by means of a dangerous weapon, to wit: a gun.

Anything either counsel wish to add to that?

MR. PULEO: I don't think so, assuming that the Court's standard instruction relative to an unlawful touching includes putting in force the motion that causes the touching, such as a bullet from a gun, et cetera. Nothing else, then. Thank you.

MR. CARROLL: That's fine, Judge.

THE COURT: All right. Then the next one we go to is the charge against Ms. Brown, accessory after the [110] fact. There are four elements that the Commonwealth must prove. First, that a felony has occurred. And I'm going to define what a felony is, that either the armed assault with intent to murder or its lesser-included offense of armed assault with intent to kill or the assault and battery by means of a dangerous weapon under the law constitutes a felony, that the Commonwealth must prove that one of those felonies occurred. They must prove that the defendant Ms. Brown knew that Mr. Smith had committed the felony. And the third element that the Commonwealth must prove is that after the felony was committed, Ms. Brown harbored, concealed or assisted Mr. Smith. And fourth, that she acted with the intent that Mr. Smith should avoid arrest, trial, or punishment.

Mr. Puleo?

MR. TOBIN: May I be heard, your Honor?

THE COURT: Well, let me go to Mr. Puleo first.

MR. PULEO: I have no comment or objection to those instructions.

THE COURT: Okay.

MR. TOBIN: Judge, as far as instructing them that the felony would be established by the commission of assault and battery by means of a dangerous weapon on the part of Mr. Smith, she was not charged with that in the [111] indictment. She was specifically charged with assault – the felony being assault with intent to murder. And I can understand that the lesser-included could come into play, but I would object to an instruction that if Mr. Smith is fond to have committed assault and battery by means of a dangerous weapon that Ms. Brown could be found guilty.

THE COURT: Mr. Puleo?

MR. PULEO: Could I have just a moment, your Honor? I know that Mr. Anderson did file a Bill of Particulars in the case.

(Brief pause.)

MR. TOBIN: I could help Mr. Puleo with that.

(Brief pause.)

MR. PULEO: I appears that both the indictment and the Bill of Particulars limit the accessory to assault with intent to murder.

THE COURT: Correct.

Mr. PULEO: As well as its lesser-included offense.

THE COURT: All right. So, with that modification. Anything else? Mr. Tobin?

MR. TOBIN: Yes, your Honor, please.

THE COURT: Yes.

[112] MR. TOBIN: I am requesting that the Court instruct the jury that the only actions on Ms. Brown's part that could constitute harboring, concealing, or assisting are the acts alleged in the indictment and the Bill of Particulars; specifically, driving away from the scene with Melvin Smith, number one –

THE COURT: I'll tell you what I said. That she drove away from the scene with Mr. Smith, knowing he shot Christopher Robinson with a firearm with the intent to murder him. It's also alleged that she gave a false statement when she told the police she was not present when Christopher Robinson was shot. Furthermore, the Commonwealth alleges that she gave a false statement about who was present at the shooting, and she gave a false statement about where and when she and Melvin Smith made a phone call from after the shooting – the place where they made the phone call from after the shooting, all of these with the intent to harbor, conceal, maintain, assist, or aid. Those are the ones that are set forth in the Bill of Particulars.

MR. TOBIN: Yes. I would add that in my – I understand the Court denied my motion for a required finding, but I did specifically point out that it's my recollection of the evidence that there is no evidence of [113] her stating a particular time to the police or to the grand

jury that she made a telephone call. So I would ask the Court to consider striking that portion of the Bill of Particulars, number one.

And number two, I'm concerned about – it's my position that anything she said to the grand jury should not be the basis for the substantive offense, because the Bill of Particulars, in my view, indicates [sic] lied to the police. And if they're going to use that as a subsequent or prior inconsistent statement, that's one thing, with regard to any inconsistences [sic] that might be in there. And I think there might be one, that I can think of.

But my request is that the Court instruct the jury that only the statements made to the police, certainly not to Belinda Carter and not to the grand jury, can form a basis for the substantive offense.

THE COURT: Okay. Mr. Puleo?

MR. PULEO: I think that the wording of the Bill of Particulars, I think we ought – well, I think that ought to control, in terms of –

THE COURT: It does.

MR. PULEO: – as the Court instructs the jury. And the way I read the Bill of Particulars, and appreciating that the Court, I think, was reading from [114] the Bill of Particulars when you stated, Judge, what you propose to instruct the jury, I don't think that you stated "lied to the police" or "made a false statement to the police" about who shot Christopher Robinson. That is specifically listed, so I would ask you to include that. If you said it, I just didn't hear it, Judge.

Appreciating that the only thing that's not going to the Bill of Particulars was pursuant to Mr. Tobin's earlier motion about his client not going to the police, and I'm not quibbling about that. I think the wording of the Bill of Particulars is clear that the – to the police – what Mr. Tobin submits as limiting language to the police is only about who shot Christopher Robinson and all the other allegations are simply that she lied, appreciating the Court's going to use the phraseology, "made a false statement regarding." And so it's not limited to the police, and so I think it does include the grand jury and all other –

THE COURT: I'm going to state that it's the statements to the grand jury that are included also.

MR. TOBIN: But not Belinda Carter, your Honor?

THE COURT: No. Any statement that she made.

MR. TOBIN: Even to a civilian?

THE COURT: Yes.

[115] MR. TOBIN: Could my objection be noted as –

THE COURT: Well, not to a civilian, because that's not –

MR. TOBIN: Well, that's Belinda Carter.

THE COURT: Yes.

MR. TOBIN: Well, it would specifically say that –

THE COURT: No. It would be the statements that she made to the police officer, the statements that she made to the grand jury, period.

MR. TOBIN: Could my objection be noted as to the grand jury statements?

THE COURT: Certainly.

MR. TOBIN: And the only other thing, Judge, is –

MR. PULEO: I'm sorry, Mr. Tobin. Before we leave that subject matter, could I note my objection, too, to –

THE COURT: Certainly.

MR. PULEO: – not include any statements to any witnesses –

THE COURT: You may note – it's noted.

MR. PULEO: Thank you.

THE COURT: All rights.

[116] MR. TOBIN: And the only other thing, your Honor, that I'd like to address would be with regard to the language in the Kelly case, which I think is significant, given the facts of this case. I have requested some specific language, on page 5, with regard to the intent to – the intent that Melvin Smith avoid arrest, trial, or punishment, with regard to if – obviously, if there's other motivations, then there's a – there would be a reasonable doubt and she'd have to be found not guilty if they find that she's motivated.

Kelly is the case that specifically said that the defendant did what he did; namely, kept custody of a gun used in someone else's robbery and told somebody that he was

going to get rid of the gun. And the SJC flipped the conviction, saying that it's just too speculative as to whether – was the so-called accessory doing these things with the gun and going to get rid of it so that the robber, the principal felon, could avoid arrest, trial, or punishment, or was he doing it for his own self-interests, so that he didn't get prosecuted.

And it's my position in this case that given the state of the evidence – I'm not trying to argue my required finding motion again with you, but I'm certainly interested in an instruction, as I've asked for, that [117] certainly if you have a reasonable doubt that she committed the acts in question with the specific intent to obstruct justice as opposed to committing the acts out of fear, out of a desire to protect herself from prosecution, or out of a desire to avoid incurring the contempt, or whatever word is appropriate, of family members, which in my view tracks *Kelly*, the rule in *Kelly*.

THE COURT: I'm not going to give it that way.

MR. TOBIN: I will be able to argue that?

THE COURT: No. That deals with a family member. This case doesn't.

MR. TOBIN: It's my intention to argue that there's reasonable doubt that she had the intent –

THE COURT: Oh, you can argue it, yes.

MR. TOBIN: – based that – that even if she did these things and he did things, she was motivated by her own selfish interests.

THE COURT: There has to be some evidence on that.

MR. TOBIN: Well, if –

THE COURT: If you –

MR. TOBIN: There was evidence, according to Christopher Robinson, that Melvin Smith, after doing the [118] shooting, with the gun in his hand, said "Let's go" and she went with him. Certainly, that is –

THE COURT: But you remember, you can't – I'm going to tell the jury you cannot speculate. You know, any inferences they draw must be reasonable and natural, based upon the evidence.

MR. TOBIN: Well, should I not be able to argue this reasonable inference that she went out of fear?

THE COURT: Well, you can argue whatever inferences you think are reasonable.

MR. TOBIN: Okay. I will be arguing those inferences.

THE COURT: Okay.

MR. TOBIN: And could I note my objection to the denial of my Request Number 4 in its language?

THE COURT: Yes.

MR. TOBIN: Thank you.

THE COURT: Let met ask, approximately how long do you think your final arguments will be? Because I have to gauge lunch for the jurors, too.

MR. TOBIN: I would say twenty minutes for myself.

MR. CARROLL: Twenty minutes, half an hour, maybe, Judge.

[119] MR. PULEO: I think I'm anticipating in that same ball park.

THE COURT: A half hour or so?

MR. PULEO: Yes.

THE COURT: All right. Let's take a 15-minute recess now and then we'll have final arguments. I think maybe what we may end up doing is having the final arguments, lunch, and then instructions.

COURT OFFICER: All rise, please.

(Recess)

COURT OFFICER: All rise.

(Jurors enter at 12:10 p.m.)

COURT OFFICER: Court is open. Please be seated.

THE COURT: May I see counsel at side-bar, please?

SIDE-BAR CONFERENCE:

THE COURT: Mr. Puleo gave me a case, *Commonwealth* v. *Sperrazza*, 372 Mass. 667, at 1977 case. And I don't know if you've had an opportunity to read it, Mr. Carroll, but the –

[120] MR. CARROLL: I'm familiar with what it says, in general, Judge.

THE COURT: The long and the short of it is – and I've checked it against other materials – and the long and the short of it is that the jury – the Commonwealth doesn't have to put in any evidence. The jury can infer the length of it based upon the type of instrument.

MR. CARROLL: *Sperrazza* is a 1977 case, Judge. The two cases that I cite in my brief memo regarding the required finding were 1997 and 1998 cases, *Hamilton* and *DeJesus* –

THE COURT: Do you have copies of them?

MR. CARROLL: Yes, Judge.

(Brief pause.)

MR. CARROLL: And I've also pointed out to the Court, without having looked at *Sperrazza* recently –

THE COURT: Let me ask you this. Do they cite *Sperrazza* in either one of these?

MR. CARROLL: I don't remember if they cite *Sperrazza* in either one of these, Judge. I don't remember off the top of my head. But in *Sperrazza*; there's testimony regarding the –

THE COURT: The bullet.

[121] MR. CARROLL: Well, there's also testimony about the defendant pulling a gun out of his waistband, or something like that, that would go to whether or not something over sixteen or eighteen inches would even be able to – capable of doing it.

THE COURT: No. I –

MR. CARROLL: There's something to be – there's some basis on which an inference can be drawn. And this –

THE COURT: Okay. Let me ask you this. Let me ask you this. In *DeJesus*, they're talking about a shotgun.

MR. CARROLL: That's right. But they're still referring to the same statute.

THE COURT: But it's a shotgun.

MR. CARROLL: That's right. But they're still saying you have to show – there has to be some evidence of the barrel length in order for it to qualify.

THE COURT: I think that can be distinguished. Let me ask you about *Hamilton*.

MR. CARROLL: It's a shotgun also, your Honor.

THE COURT: Okay.

MR. CARROLL: And in *Commonwealth* v. *Muse*, which I cite as a – as a court case in my memo, it's a [122] handgun. In *Commonwealth* v. *Muse*, the Commonwealth conceded there was no evidence as to barrel length. So all the appellate courts did in that situation was, since the Commonwealth conceded there was no evidence as to barrel length, they entered a finding as not guilty.

THE COURT: Yes, but that hasn't happened here.

MR. CARROLL: Right. I understand that. But what I'm suggesting is, the facts in *Muse* are a little different

than the facts in this case regarding whether or not there's any evidence of the barrel length. In *Hamilton*, there's a – if I may, Judge –

MR. PULEO: I don't want to interrupt anybody's thought train, but I do have a suggestion.

THE COURT: Okay.

MR. PULEO: I have another cite that I just learned about at the break. It's a '93 court of appeals case. What I would request, though, rather than research on what I think is a legitimate question, at least to these three, though they have differing ideas of what the controlling law was, if the Court allows me to take the count to the jury and then certainly if the jury comes back not guilty, it's moot. But if they come back guilty and the Court is of the mind that that charge should not have gone to the jury, under Rule 25, of [123] course, the Court still –

THE COURT: Uh-huh. I can always set it aside.

MR. TOBIN: – has the option to allow the motion at that point and then we don't have to –

THE COURT: I think that's the way we'll do it. So we'll let it go to the jury.

MR. PULEO: Thank you. There's two other points.

THE COURT: Yes.

MR. PULEO: One is, I'm requesting to call Detective Smith for a rebuttal, and the offer of proof is just that while he talked to Patricia Brown several times about the case, she never mentioned to him any dispute or

argument that she had witnessed between Mr. Verdieu and Mr. Robinson.

And then the third thing is relative to sanitizing the photo array exhibits. We all collectively recall that all the numbers on the bottom came off.

THE COURT: Right.

MR. PULEO: But we didn't have any consensus in terms of recollection as to the numbers in the top right corner. I think initially something came off and then we said – and then I thought the Court maybe changed her mind.

[124] THE COURT: What we did was, we left the date on there and the time.

MR. PULEO: Okay.

THE COURT: In the upper right-hand corner.

MR. PULEO: Okay. But the next two lines come off?

THE COURT: They come off.

MR. PULEO: Okay.

THE COURT: All right. With respect to recalling the detective, I'm going to deny that. You made your offer of proof.

MR. CARROLL: On my motion for a required finding on the handgun, in addition to the barrel length –

THE COURT: Yes, I'm reversing that.

MR. CARROLL: In addition to arguing the barrel length, there were other grounds within the motion

for asking the Court to direct that particular finding to be not guilty. I would like to argue those issues and –

THE COURT: No. I'm going to deny it at this point, your motion for a required finding of not guilty on the gun charge.

MR. CARROLL: Well, I just want to make sure the Court, and that it's on the record, that part of the [125] motion is that –

THE COURT: The motion has already been ruled on in this case.

MR. CARROLL: – the only evidence as to where Mr. Smith was staying at the time of the shooting is the statement of Christopher Robinson that Mr. Smith was, in fact, staying at – had been staying at their – at 33 Lawn Street for the same amount [sic] time that Mr. Robinson had, for a week preceding the shooting.

THE COURT: I understand.

MR. CARROLL: That's the residence –

THE COURT: I understand, and I'm denying it.

MR. CARROLL: And also, I've also argued by analogy the *Castle* statute, that he's there as a legitimate guest, at worst.

THE COURT: Yes. Thank you.

(End of side-bar conference.)

THE COURT: Mr. Tobin?

MR. TOBIN: With the Court's permission, yes, Your Honor.

THE COURT: Certainly.

MR. TOBIN: May I proceed?

THE COURT: Certainly.

* * *

[204] alleges that the defendant committed an assault and battery by means of a dangerous weapon, to wit: a gun, on Mr. Robinson. And the essence of the Commonwealth's battery, the second element, being that the bullet discharged from the gun hit Mr. Robinson, constituting an unprivilegd [sic] touching.

So if you find that the Commonwealth has proven beyond a reasonable doubt that the defendant assaulted Mr. Robinson, that he committed the battery, that is, discharged a bullet from the gun, and the bullet hitting Mr. Robinson being a touching without right or excuse for doing so, and that it was done with a dangerous weapon, to wit: a gun, you shall find the defendant guilty of assault and battery by means of a dangerous weapon.

If the Commonwealth has failed to prove beyond a reasonable doubt any one of those elements, you shall find the defendant not guilty.

The next indictment, the third indictment against Mr. Smith, is for possession of a firearm, not being at home or work. In order to prove the defendant guilty of this particular indictment, there are four elements the Commonwealth must prove and they must prove each one beyond a reasonable doubt.

The first element the Commonwealth must prove [205] beyond a reasonable doubt is that the defendant possessed a firearm; second, that the item that the defendant

possessed met the legal definition of a firearm; third, that the defendant knew he possessed the firearm; and fourth, that the defendant possessed a firearm outside his residence or place of business. Let me go over those four elements again.

One, that the defendant possessed a firearm; two, that the item that the defendant possessed met the legal definition of a firearm; three, that the defendant knew he possessed a firearm; and four, that he possessed a firearm outside of his residence or place of business.

A firearm is defined in our law as a pistol, revolver, or other weapon, loaded or unloaded, from which a shot or bullet can be discharged, and the length of whose barrel is less than sixteen inches. So that's the definition of a firearm: a pistol, revolver, or other weapon, loaded or unloaded, from which a shot or bullet can be discharged, and the length of whose barrel is less than sixteen inches.

The definition can be broken into three elements itself. First, it must be a weapon; second, it must be capable of discharging a shot or a bullet; and third, it must have a barrel length of less than sixteen [206] inches. The term barrel length refers to that portion of a firearm from which a shot or a bullet is driven, guided, or stabilized, and it includes the chamber.

As I mentioned before, the Commonwealth must prove beyond a reasonable doubt that the defendant knew he possessed this item and also knew that it was a firearm within the common meaning of the term.

The fourth element the Commonwealth must prove beyond a reasonable doubt is that the defendant possessed the firearm outside of his residence or place of business.

The person's residence or place of business does not include common areas of an apartment or office building, but only areas that are under that person's exclusive control.

If the Commonwealth proves beyond a reasonable doubt each one of the four elements that I have just defined for you, that is, the defendant possessed a firearm, that the item that he possessed met that legal definition of a firearm, that he knew he possessed the firearm, and that he possessed a firearm outside of his residence or place of business, you shall [sic] the defendant guilty as charged. If the Commonwealth fails to prove beyond a reasonable doubt any one of those four elements, you shall find the defendant not guilty.

* * *

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
NO. 96-11471, 98-11521
96-11797

COMMONWEALTH OF MASSACHUSETTS

v.

MELVIN T. SMITH (SUCR96-11471 and
SUCR98-11521)
FELICIA BROWN (SUCR96-11797)

November 13, 1998
Boston, Massachusetts
Before: Donovan, J.
Day 7 – Deliberations

* * *

[7] Wayne Clark." I have spoken with counsel and counsel have all agreed that I indicate on here, "No. It is not an exhibit." I have done that and signed my name, Judge Donovan. We'll mark this for identification, D for Identification. I'll put it back in the envelope and the court officer can return it and tell them to, after they read it, to give it back and return it to the courtroom.

All agreed, counsel?

MR. PULEO: Yes.

MR. CARROLL: Agreed.

MR. TOBIN: Thank you.

(Question from jury marked Exhibit D for identification.)

(Recess)

THE CLERK: Before the Court is *Commonwealth v. Melvin Smith* on Indictment 98-11521, argument on defendant's motion for a required finding of not guilty.

THE COURT: Mr. Carroll?

MR. CARROLL: Judge, I guess I'm going to ask the Court to reconsider. When this motion was first presented at the end of the Commonwealth's evidence, the Court allowed the motion. And I think Mr. Puleo agreed, [8] that in some ways what I would call the magic question had never been asked, and there's certainly never been a magic answer, about what the length of the barrel was. And I believe Mr. Puleo acknowledged that that, in fact, did not happen. And as a result, the Court allowed the motion for a required finding as to the '98 indictment.

Mr. Puleo then gave the court a copy of *Commonwealth v. Sperrazza*, which the Court seemed to indicate that it might be something that a jury could infer. And there is a more recent case, *Commonwealth v. Manning*, as the Court noted yesterday. And I would point out, as I did in my memorandum in support of the motion that both *Commonwealth v. DeJesus* and *Commonwealth v. Hamilton*, deal with this identical issue, but the issue in *DeJesus* and *Hamilton* was a shotgun and not a handgun. But the definition of those is all found in Chapter 269, Section 10, where a shotgun is defined as something – for the purpose of the statute, something under eighteen inches, whereas a handgun is described as something with a barrel less than sixteen inches.

So I think the kind of reasoning and thought and rationale behind *Hamilton* and *DeJesus* is fully applicable to what we have in front of us today, and that is that there's just no testimony whatsoever about the [9] length

of the barrel, and that the defendants, in fact, are entitled to a required finding, because there's nothing on which the jury could base a decision.

And when you look at the fact patterns in *Sperrazza* and in *Manning*, it's my reading of the facts in those cases that there are, I would suggest, minimal facts, but some facts, from which a jury couldn't rely to come to a conclusion or reach an inference that the barrel length was, in fact, less than sixteen inches.

In *Sperrazza*, my memory is, and I took a quick look at it again, that there's some suggestion that the defendant pulled the gun from his waistband, or something to that effect. And I think it's reasonable to infer in that situation that someone hasn't got a 16-inch barrel stuck down into his pants. And the same thing is somewhat true in *Manning*, where Manning is charged with shooting someone with a gun from the pocket of a coat. And again, the 16-inch barrel of a gun doesn't – there's no reasonable inference that a barrel over sixteen inches is going to fit into the pocket of the coat. And from those facts, I think you may be able to draw an inference.

There isn't anything like that in the case now before the Court involving Mr. Smith. The testimony from [10] Mr. Robinson is that he sees Mr. Smith standing in the doorway with a gun in his hand and that he then sees that gun discharge and the bullets hit him. He describes that gun as revolver. But as the Court told the jury yesterday about what a firearm was, one of the things the Court said was that a firearm is a pistol or a revolver or any another weapon which can be used to discharge a bullet and has a length over – or under sixteen inches.

So the fact that someone described something as a revolver, is not determinative. It must also include the description of the length – a barrel length of under sixteen inches.

And so my argument, I guess, is that the facts in this case are not similar to *Sperrazza* or *Manning* and that there isn't anything to draw an inference from, whereas there might well have been under *Manning* and *Sperrazza* and the rationale and thinking of *DeJesus* and *Hamilton* is applicable to this case, where there's no magic question, no magic answer, and no description of the gun other than it being a revolver.

THE COURT: Thank you.

Mr. Puleo.

MR. PULEO: Thank you, Judge. Mr. Carroll's impression notwithstanding, it's still the Commonwealth's [11] position that *Sperrazza* is the controlling statement of the law in this area from the Supreme Judicial Court. There have been a series of Court of Appeals decisions since then. Understandably, many of the cases turn on their facts. And as a matter of fact, *Sperrazza* has been cited repeatedly for the proposition that whether a gun in question fits the statutory definition of requirements of what a firearm is, in fact, a question of fact for the jury.

It's clear that what Mr. Carroll has referred to as the one magic question, "Is the barrel length less than sixteen inches or not?" is not a requirement, notwithstanding Mr. Carroll's statement. I think *Sperrazza* made that clear, and all the cases since then. I did have an opportunity –

THE COURT: I don't think he was arguing that so much. I think he said truly that was not asked, and the

parties agreed to that. Then the next step is, is there sufficient circumstantial evidence for a jury to draw a reasonable inference that, in fact, this item had a barrel less than sixteen inches.

MR. PULEO: Right. And I was able, between our discussion yesterday and today, to Shepardize the *Sperrazza* case. It's cited with approval in a number of [12] a [sic] cases. Many of the cases deal with the question of the operability of the firearm in question. Clearly, I think it's fair to say that we don't have that issue here.

THE COURT: Correct.

MR. PULEO: But my bottom-line assertion is that *Sperrazza* is still good law. I note the applicable language of *Sperrazza*, while it is true – and if I may read from the *Sperrazza* opinion, and I'm on the last page of the opinion, where the SJC says, "Whether a gun is a firearm, as defined, is a question of fact for the jury." And they cite *Bartholomew*, ". . . the defendant contends that there was no evidence as to the length of the barrel. We disagree. DeVingo," who apparently was the witness in the case, D-E, capital V, -I-N-G-O, "DeVingo testified that he saw the defendant, quote, reach in back of his coat and draw a revolver, that it was a handgun and was sort of large, dark, black, I think, it was. Another witness referred to it as a handgun. A ballistics expert testified that the fact that no shell casings had been found indicated that a revolver had been used.'"

Then the court goes on to say in the next paragraph, in their conclusion, "In ordinary usage, a revolver is a species of pistol or a handgun. All are [13] short firearms. We think that the jury could conclude beyond a reasonable

doubt that the gun in question was not a weapon with a barrel sixteen inches long or longer."

The court doesn't say – as the *Manning* Court of Appeals opinion suggests, explicitly relies on the fact that the gun was in this trench coat pocket. The *Sperrazza* case does not say anything about, well, since the weapon in question was pulled from a coat, that's the significant factor. They seem to focus on the ordinary usage of the term revolver.

I also note for the Court *Commonwealth v. Sylvester*. That's at 35 Mass. Appellate Court, at page 906. And in that case, again the question was, was the weapon a firearm as defined in Chapter 140, Section 121. In *Sylvester*, the victim testified that the person who shot him used a hand-held weapon which he thought was a .25-caliber Beretta automatic. And the Court there says, "The jury could infer from that testimony that the assailant who fired the shots was using a handgun. It was not necessary to wheel up an expert."

And at the very least, we have as much evidence in this case as we do in *Sylvester*. As I indicated, my recollection of the testimony is that Mr. Robinson [14] himself laid some foundation for familiarity with handguns because his father was, I think he said, a collector, and so he was familiar with handguns, generally. He estimated the handgun to be either a .32- or .38-caliber. He identified the weapon as a revolver and described how the barrel of the revolver turns as opposed to a magazine – or an automatic that has a clip or a magazine.

I believe it was Detective Smith, I'm not certain, but I know one of the officers – I'm pretty sure it was the detective in charge of the case, Tony Smith – explained to

the jury the distinction between a revolver and an automatic. And while there were was – many witnesses questioned about the lack of any ballistic evidence at the scene, the upshot, I suggest, of their testimony was that since the report was that it was a revolver, it's not surprising that we're not finding casings, because revolvers don't eject casings.

And one of the cases that cites *Sperrazza* with approval is *Commonwealth v. Sampson*. That's at 383 Massachusetts Reports, at page 750. The page that I'm quoting from is page 761. And again, that is actually the case that talks about whether a flare gun, I think, is a weapon that falls within the statute. And in [15] passing, the SJC notes, "We have often stated that whether a gun is a firearm, under Chapter 140, Section 121, is a question of fact for the jury. We have done so in the context of conventional firearms only when either the firing capability or the length of its barrel was an issue." Then they say a flare gun is another thing and that might be subject to a ruling as a matter of law.

And the reason I mention that case is because, of course, the context that we're in now is viewing the evidence in the light most favorable to the prosecution. And I think clearly, given the Sperrazza case, the Sylvester case, and the Watts case, which is 22 Mass. Appellate Court, page 952 –

THE COURT: Well, that distinguishes *Sperrazza*, the Watts case, and it says that you need something more than the fact that the gun was concealed under a coat. That would be insufficient, even though it may be more likely than not that the barrel was less than sixteen

inches. But the court there said that the burden of proof required something more than that.

MR. PULEO: On those facts –

THE COURT: And so it distinguished *Sperrazza*, saying that if we're leaving it up to inferences, there has to be something that a jury could reasonably infer, [16] not guess, not speculate, but reasonably infer.

MR. PULEO: I agree with the Court's statement of the decision in *Watts*. But in their process of distinguishing *Sperrazza*, that is, that *Sperrazza* is enough, in *Watts* we don't have enough, what they cite as enough in *Sperrazza*, I submit, is – unlike *Sperrazza*, they say, ". . . in which witnesses described the gun they saw as a revolver and a handgun and a ballistics expert testified concerning the significance of the absence of shell casings." That's all the facts they say to explain why *Sperrazza* is different than *Watts*, the case before it.

And so it seems to me, given all those factors, that it is reasonable for this jury to conclude that the weapon that Mr. Smith – if, in fact, they find Mr. Smith is the shooter, obviously – that the weapon he used was a firearm. I think there is sufficient circumstantial evidence that it would not be mere conjecture or speculation. It would be a reasonable inference from the evidence. Mr. Robinson did testify that Mr. Smith held the gun in one hand, he had it in his right hand, and he lifted it up to his waistband and fired three shots in rapid succession without any indication that he needed a second hand to wield or discharge the weapon.

[17] And I know that the Court had directed counsel's attention to *Manning* – the most recent, as far as I'm

aware, case on this issue. And again, while *Manning* has the additional fact of the trench coat pocket, there's nothing in *Manning*, either in its holding or in its discussion, albeit brief, that suggests in any way that the Court is moving away from or requiring more than the *Sperrazza* Court.

THE COURT: Well, I think what all these cases stand on is the proposition that the Commonwealth must prove the length of the barrel. Now, that can either be done by direct evidence or by circumstantial evidence. That seems to be what the state of the law is, both from the SJC's cases and the appeals court cases.

MR. PULEO: I agree with that. No question. And I think that *Sperrazza* –

THE COURT: And so the question for me, then, is, is there sufficient circumstantial evidence to leave this with the jury.

MR. PULEO: And my position is, given that we're viewing the evidence, obviously, in the light most favorable to the Commonwealth, given the holding in *Sperrazza*, where the only testimony was ". . . a handgun or revolver, large, dark black, I think," and an [18] explanation as to the significance or, if you will, insignificance of no shell casings –

THE COURT: There was ballistic expert testimony, I think, in *Sperrazza*; was there not?

MR. PULEO: They do quote the person as a ballistic expert, yes.

THE COURT: Okay.

MR. PULEO: And again, I would certainly submit while Detective Smith didn't testify to being especially trained in ballistics, he certainly testified to a lot of police experience, and he testified to familiarity with weapons, and was able to explain – unchallenged, I note, if it's believed by the jury – consistent with, I think, Mr. Robinson himself describing the distinction between revolver and an automatic and whether casings are ejected in one and not the other. And if my – they might not have been, Detective Smith and Mr. Robinson, the only witnesses to testify to that. I don't have a specific recollection. But I do recall there was not only Mr. Robinson's sharing the testimony about his familiarity with guns, but police testimony as well, about revolvers versus automatics.

Again, in *Sylvester*, all the evidence there was a hand-held weapon which the victim thought was a .25- [19] caliber Beretta automatic. In that case, the court of appeals says that's enough for a jury to infer it's a firearm under the statute. Here you have the victim saying it's either a .32 or .38 revolver, hand-held. And I think, given the light most favorable to the Commonwealth, the evidence is sufficient.

THE COURT: All right. I will take this under advisement. Thank you.

(Recess)

COURT OFFICER: Court. All rise.

(Jury enters at 3:57 p.m.)

COURT OFFICER: Court is in session. Please be seated.

THE COURT: Mr. Foreman, members of the deliberating jury and our alternates, I've received a note from the jury which states, "Could you please tell me the law on reasonable doubt?" I will reinstruct you on reasonable doubt. And again, I will quote to you from *Commonwealth v. Webster*.

"Then what is reasonable doubt? It's a term often used, probably pretty well understood, but not easily defined. It's not mere possible doubt, because

* * *

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
NO. 96-11471, 98-11521
96-11797

COMMONWEALTH OF MASSACHUSETTS

v.

MELVIN T. SMITH (SUCR97-11471 and SUCR98-11521)
FELICIA BROWN (SUCR96-11797)

November 16, 1998
Boston, Massachusetts
Before: Donovan, J.
Day 8 – Verdict and
Jury-Waived Trial

* * *

[6] until this moment, has anyone discussed this case with anyone else? If you have, please raise your hand.

No hands have been raised.

Has anyone read anything about this case or listened in any form of media or read anything in any form of media about this case during that same time period?

No hands have been raised.

We'll send the jury back to continue with its deliberations.

COURT OFFICER: All rise. Jurors, step this way.

(Jurors exit at 9:26 a.m.)

THE COURT: You may be seated. With respect to the issue that I heard on Friday regarding the indictment for possession of a firearm, I had originally, if my recollection serves me right, allowed the motion for a required finding of not guilty, which then was reversed based upon *Commonwealth* v. *Sperrazza*. I've reviewed all of the case law that counsel has cited for me, plus other cases, and I conclude that the decision that I rendered, which denied the motion for a required finding of not guilty, will stand.

And at the conclusion of this trial, we will go [7] forward – I will hold this jury – and we will go forward with the trial. If there is a conviction on the underlying offense, then we will go forward with the trial on the fourth and subsequent offense. And as I said, I will hold the jury for that.

Please have witnesses ready to go so that we won't have to hold this jury too long, because they've been deliberating and working hard and we've had a day off, and so on and so forth. So I want to minimize the additional time that we may have to hold this jury. And I'd appreciate all counsel be ready for trial in the event that there is a finding on the underlying offense.

COURT OFFICER: All rise, please. Court is in recess.

(Recess)

COURT OFFICER: Court. All rise.

(Jurors enter at 10:44 a.m.)

COURT OFFICER: This court is open. Please be seated.

THE COURT: Members of the deliberating jury and alternates, the jury requested a copy of the statutes concerning accessory after the fact. Rather than giving you a copy of the statutes, I'm going to again read the statute to you and then I'll tell you what the elements

* * *

[14] please.

THE CLERK: Members of the jury, have you agreed upon your verdicts?

FOREMAN: Yes.

THE CLERK: May I have them, please.

(Brief pause.)

THE CLERK: Mr. Foreperson, I will begin with Melvin Smith first.

What say you, Mr. Foreperson, as to Indictment Number 96-11471, Offense 001, charging the defendant Melvin Smith with armed assault with intent to murder, is he guilty or not guilty of any offense?

FOREMAN: Guilty.

THE CLERK: Guilty of what?

FOREMAN: The offense as charged.

THE CLERK: As to Offense 002, charging the defendant Melvin T. Smith with assault and battery by means of a dangerous weapon, is he guilty or not guilty?

FOREMAN: Guilty.

THE CLERK: And as to Indictment Number 98-11521, charging the defendant Melvin T. Smith with possession of a firearm, not being at home or work, no license, is he guilty or not guilty?

FOREMAN: Guilty.

[15] THE CLERK: I will affirm the indictments on this.

Members of the jury, harken to your verdict as the Court has recorded them. You do, upon your oath, say that the defendant Melvin Smith is guilty on Indictment Number 96-11471, Offense 001, charging him with assault with intent to murder. So say you, Mr. Foreperson?

FOREMAN: Yes.

THE COURT: Armed assault with intent to murder.

THE CLERK: Yes. Armed assault with intent to murder. So say you, Mr. Foreperson?

FOREMAN: Yes.

THE CLERK: So say you, all members of the jury?

(Affirmative response.)

THE CLERK: Furthermore, you say that the defendant Melvin T. Smith is guilty of assault and battery by means of a dangerous weapon. So say you, Mr. Foreperson?

FOREMAN: Yes.

THE CLERK: So say you, all members of the jury?

(Affirmative response.)

[16] THE CLERK: Furthermore, you say on your oaths that the defendant is guilty of possession of a firearm, not being at home, work, no license. So say you, Mr. Foreperson?

FOREMAN: Yes.

THE CLERK: So say you, all members of the jury?

(Affirmative response.)

THE CLERK: What say you, Mr. Foreperson, as to Indictment Number 96-11797, charging the defendant Felicia Brown with accessory after the fact to armed assault with intent to murder, is she guilty or not guilty?

FOREMAN: Not guilty.

DEFENDANT BROWN: Thank you, people.

THE CLERK: Members of the jury, harken to your verdict as the Court has recorded them. You do, upon your oaths, say that the defendant Felicia Brown is not guilty on Indictment Number 96-11797, charging her with accessory after the fact to armed assault with intent to murder. So say you, Mr. Foreperson?

FOREMAN: Yes.

THE CLERK: So say you all, members of the jury?

* * *

[83] through print comparisons prove beyond any reasonable doubt that, in fact, this Melvin Smith, even just looking at the photo, one can readily, I submit, conclude that Melvin T. Smith is the same as this Melvin T. Smith.

And again, relative to Mr. Carroll's argument that there is no sort of correlation or interlocking of dates of arrest and dates of convictions, I beg to differ. At the very least, the CORI record verifies the dates of arrest as they travel to convictions. The two state charges include, as part of the certified copy of convictions, the indictments themselves, which clearly show the dates of offense being 2/25/90 and 9/22/90. The federal paperwork does not show the date of arrest. But again, from CORI information, as well as the testimony that was submitted by Officer Bersani, I think the Commonwealth has proven its case beyond a reasonable doubt as to a fourth offense against Mr. Smith.

THE COURT: Thank you. I've reviewed the exhibits while waiting for the fingerprinting to occur with Officer Toomey, and I've listened to Officer Toomey's testimony and the arguments of counsel, and I find the defendant guilty of a fourth and subsequent offense of possession of a firearm, not being at home or work, without a license.

* * *

[96] THE COURT: Thank you.

THE CLERK: Melvin Smith, would you please rise.

The jury having found you guilty on Indictment Number 96-11471, Offense 001 and 002, and the Court having found you guilty on 98-11521, upon consideration

of these offenses sentences you, on 96-11471, Offense 001, charging you with armed assault to murder, to the Mass. Correctional Institute at Cedar Junction for a term of not more than fifteen years nor less than twelve years. And to Offense 002, the Court, upon consideration of this offense of assault and battery by means of a dangerous weapon, sentences you to the Mass. Correctional Institute at Cedar Junction for a term of not more than ten years nor less than nine years. This sentence is to run concurrently with the sentence imposed on 001.

And as to the offense on 98-11521, upon consideration of this offense, the Court sentences you to the Mass. Correctional Institute at Cedar Junction for a term of not more than twelve years nor less than ten years. This sentence is to run concurrently with the sentence imposed on 001 of 96-11471.

You are notified of your right to appeal to the Appellate Division and you are notified of your right to

* * *

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS. SUPERIOR COURT
NO. 98-11521

COMMONWEALTH

V.

MELVIN SMITH

MOTION FOR REQUIRED FINDING

Now comes the defendant in the above-entitled matter, Melvin Smith, and moves this Honorable Court to order a finding of not guilty to enter on this indictment.

The defendant moves for a required finding on two grounds. First, the Commonwealth has not presented any evidence that the barrel of the firearm used in this case was less than sixteen inches, a necessary element of the crime. See *Commonwealth v. Hamilton*, 426 Mass. 67(1997), and *Commonwealth v. DeJesus*, 44 Mass. App. Ct. 349(1998). In accord, *Commonwealth v. Muse*, 35 Mass. App. Ct. 466. In the *DeJesus* case the only evidence offered regarding the firearm was the victim's statement that the firearm was a shotgun. In order for the statute to apply there needed to be evidence presented that the length of the barrel was "less than eighteen inches". When no such evidence is produced it is error to deny the defendant's Motion for Required Finding.

In the case now before the court, the only evidence regarding the firearm was Mr. Robinson's testimony that he observed a .32 caliber revolver in Mr. Smith's hand. No further description was given of the gun, not even whether the barrel was long or short. Under these circumstances the defendant is entitled to a required finding of not guilty as to this indictment.

The second basis for the Motion For Required Finding is that the defendant is charged with a violation of G. L. c269, section 10(a), possession of a firearm, not at home or work. The evidence in this case does not show the defendant is not entitled to the exemption provided by G.L. c269, section 10(h), in that the testimony supports one of two propositions, either of which results in the entry of a not guilty finding as Mr. Smith was 'at home' at the time of the alleged violation.

Mr. Robinson testified that Mr. Smith was 'staying' at 33 Lawn Street, third apartment, at the time of the shooting. When Mr. Robinson was asked who was staying at that address during the time he was staying there, he listed the following people: Romanis Charles, himself, Felicia Brown and Melvin Smith. If in fact Mr. Smith was staying at 33 Lawn Street, then he was at home at the time of the alleged possession and is entitled to a not guilty finding. Even if the stay was temporary, Mr. Smith is entitled to the same outcome. In cases such as *Commonwealth v. Brass*, 42 Mass. App. Ct. 88(1997), it has been the suggestion of the appellate courts that a temporary visitor is still entitled to the rights and privileges of calling his temporary shelter his home. The United States Supreme Court and the Supreme Judicial Court have held that a hotel guest has a reasonable expectation of privacy during during the time of his authorized occupancy. See *Stoner v. California*, 376 U.S. 483(1964), and *Commonwealth v. Paszko*, 391 Mass. 164(1984).

If Mr. Smith is not entitled to the 'at home' exception suggested by Mr. Robinson's testimony that Mr. Smith was staying at that location, then Mr. Smith is entitled to a finding of not guilty on the basis of being a guest in the home of Felicia Brown. The evidence in the case is clear that Mr. Smith was on the premises legally and with the consent, and at the invitation of Ms. Brown. He is, at worst, her guest. Ms. Brown could not be found guilty of a violation of section 10(a) for the actions attributed to Mr. Smith. As Ms. Brown's guest, neither should Mr. Smith. Just as hotel guests are given constitutional rights while they are lawfully on the premises, so too should a guest be afforded the same protections as the resident of a home. In G.L. c278, section 8A (the so-called 'castle' statute), the legislature set out an exception to the flight rule before defending oneself. It gives the resident a defense if the "... occupant was in his dwelling at the time of the offense." It is unimaginable that the legislature did not intend a resident's legitimate guest in the dwelling to have the same protection and the same defense. So too should a lawful guest have the same rights and protections as the resident under the statutory scheme contained in G.L. c269, section 10(a), and 10(h). It would be anomalous for the legislature to criminalize the conduct of a guest in possession of a homeowner's firearm when the host's identical conduct would not be criminal, or subject to the same punishment.

For the foregoing reasons, the defendant's Motion For Required Finding should be allowed.

Respectfully submitted,

/s/ Bruce W. Carroll
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720-1413
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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
DEPARTMENT OF THE TRIAL
COURT, FOR THE TRANSACTION
OF CRIMINAL BUSINESS

November Sitting, A. D. 1998

No. SUCR98-11521-001 – Possession Of Firearm, Not Being At Home Or Work, No License

VERDICT SLIP

COMMONWEALTH vs. Melvin T. Smith

In the above-entitled case, the jury say that the defendant is

1. ____ NOT GUILTY
2. ✓ GUILTY OF OFFENSE AS CHARGED

and this is their verdict.

/s/ Leon Edwards 11/16/98
Foreperson

November ___, 1998

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPERIOR COURT**
CRIMINAL ACTION
NO. 96 SUCR 11471
98 SUCR 11521

COMMONWEALTH OF MASSACHUSETTS

vs.

MELVIN T. SMITH

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR A NEW TRIAL

INTRODUCTION

Defendant Melvin T. Smith ("Smith"), convicted on charges of assault with intent to murder, assault and battery by means of a dangerous weapon, and unlawful possession of a firearm (fourth offense), has filed the instant motion for a new trial pursuant to Mass.R.Crim.P. 30(b). Smith, through counsel, asserts that the trial judge committed eight separate errors which necessitate a new trial.

For the reasons set forth below, the defendant's motion for a new trial is **DENIED.**

BACKGROUND

On November 16, 1998, a Suffolk Count [sic] jury convicted Melvin T. Smith of armed assault with intent to murder, G.L. c. 265, § 18, assault and battery by means of a dangerous weapon, G.L. c. 265, § 15A, and unlawful possession of a firearm. G.L. c. 268, § 10. Subsequent to the convictions, the court proceeded to trial on the second

and subsequent portion of the unlawful possession of a firearm indictment. Following the jury-waived trial, the court convicted Smith of a fourth offense of unlawful possession of a firearm. G.L. c. 269, § 10(d). It is from these convictions that Smith has filed his motion for a new trial. Mass.R.Crim.P. 30(b).

The victim in the instant case, Christopher Robinson ("Robinson"), was the first cousin of Felicia Brown ("Brown"), the then-girlfriend of Smith. Brown and Robinson were close, and often visited each other. In August 1996, Brown's mother traveled out of town for two weeks and allowed Robinson to stay with Brown at her house while she was away.

It was during this time that Robinson became acquainted with Smith. The two men allegedly had a friendly relationship and often spoke. On August 15, 1996, Robinson had spent the day drinking. Over the course of twelve hours, he had consumed a fifth of vodka and at least forty ounces of beer. Later that same day, Robinson, Brown, and Smith all ate dinner together. There was no evidence of any malevolent behavior by any one party against any other.

At approximately 4 a.m., Robinson walked downstairs. When he reached the bottom of the staircase, he saw Smith and Brown in Brown's bedroom. Smith, according to Robinson, was holding "a pistol," which appeared to be either "a .32 or a .38." Smith fired the gun, hitting Robinson three times. Smith then turned to Brown and said, "let's go," in an effort to leave the house. Robinson then said, "I know who you are, Melvin. Why you shoot me? Why you shoot me? I know who you are. You[r] name is Melvin." Robinson stated that Brown said, "His last name

is Smith." Brown and Smith left the house, while Brown's step-father, who had heard the three shots, called for assistance.

Boston Police Officer Wayne Clark ("Clark") responded to the 911 call. When Clark asked Robinson who had shot him, Robinson responded, "Melvin." When Clark asked for Melvin's last name, Robinson stated that he did not know it. Robinson did tell Clark that Melvin was Brown's boyfriend.

Robinson was transported to Brigham & Women's Hospital, where he underwent surgery. By September 7, 1996, Robinson was still on a ventilator, but was able to communicate non-verbally. Robinson was asked by a Boston detective to look at a photo array and identify the person who shot him. Robinson was able to identify Smith.

Robinson testified at Smith's trial. Following Smith's convictions, Robinson died due to liver damage that resulted from the gun shot wounds. Subsequently, a Suffolk Count Grand Jury indicted Smith on murder charges. That trial has yet to occur.

DISCUSSION

"The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done." Mass.R.Crim.P. 30(b). A motion for a new trial is addressed to the sound discretion of the judge, and the judge's disposition of the motion will not be reversed unless it is manifestly unjust or unless the trial was infected with prejudicial constitutional error. See *Commonwealth* v. *Moore,* 408 Mass. 117, 125 (1990) (internal citations omitted).

In the instant case, Smith raises eight issues in which he alleges error. Specifically, Smith contends that: (1) Smith's joint trial with non-testifying co-defendant Brown deprived Smith of his constitutional right to confront and cross-examine his accusers, particularly where Robinson testified to a statement of Brown's which identified Smith as the shooter; (2) Brown presented an antagonistic defense whereby, at the last minute, she accused Smith of being the shooter and of menacing Brown into covering for him; (3) Smith was deprived of his constitutional right to counsel where the trial judge answered nine questions from the jury without first giving counsel an opportunity to be heard; (4) Smith was placed in double jeopardy where the trial judge allowed Smith's motion for a required finding of not guilty on the possession of a firearm indictment at the close of the Commonwealth's case, but then "reinstated" the charge after Smith had rested; (5) Smith was deprived of his right to an impartial jury when counsel for Brown exercised peremptory challenges in a discriminatory manner; (6) the jury was erroneously instructed on excessive force in self-defense because the instruction misplaced the burden of proof; (7) Smith was deprived of his due process rights where his conviction for possession of a firearm (fourth offense) rested on insufficient evidence; and (8) Smith was deprived of a fair trial where a crucial witness to the identification issue gave trial testimony which was materially different from her voir dire testimony.

At trial, counsel for Smith objected and preserved for appeal only two of the aforementioned issues; issues four and eight. Therefore, this memorandum addresses the merits of only Smith's double jeopardy argument and Smith's contention that a crucial identification witness

gave trial testimony that was materially different from her voir dire testimony. Issues one, two, three, five, six, and seven were not objected to at trial, are deemed waived, and this court expressly declines to resurrect them. See *Commonwealth* v. *Sowell,* 34 Mass. App. Ct. 229, 230-231 (1993) (no resurrection where trial judge expressly stated he was not addressing certain issues in motion for new trial where issues could have been raised either at trial or in direct appeal).

I. "Reversal" of the Allowance of Smith's Motion for Required Finding of Not Guilty on the Firearms Offense.

Smith contends that the court erred in "reversing" its allowance of the defendant's motion for a required finding of not guilty on the firearms offense. During trial, after the Commonwealth had completed its case, the court allowed Smith's motion for a required finding of not guilty on the firearms charge. However, after the defendant's case, the court, relying on *Commonwealth* v. *Sperrazza,* 372 Mass. 667 (1977), withdrew its allowance of Smith's motion and allowed the firearms charge to go to the jury.[1] Smith was subsequently convicted on the charge. In seeking a new

[1] At issue in Smith's trial with respect to the firearms charge was the length of the weapon's barrel. The Commonwealth was required to prove that the barrel was less than sixteen inches. G.L. c. 269, § 10(a); G.L. c. 140, § 121. At trial, Robinson testified that the weapon was "a pistol," and "a .32 or a .38." In *Commonwealth* v. *Sperrazza,* 372 Mass. 667 (1977), which the court finds apposite in this case, the Supreme Judicial Court held that a jury may infer that a barrel was less than sixteen inches where there was testimony that the gun was a "revolver" or a "handgun" even though no evidence as to the barrel's length was presented.

trial, Smith contends that the court's allowance, and then subsequent withdrawal of the allowance, placed Smith in double jeopardy, in violation of Smith's constitutional rights. There was no error.

A criminal defendant has a constitutional right not to be placed in jeopardy twice for the same offense. *Commonwealth* v. *Lowder,* 432 Mass. 92, 103 (2000). When a defendant has been put in jeopardy for an offense and acquitted, he may not be retried for that offense. *Id.* The defendant, relying on the above-stated rule, contends that the allowance of the motion, and then the subsequent withdrawal of it later in the trial, placed him in double jeopardy because upon the court's allowance of the motion, jeopardy terminated as to that charge. See *Lowder,* 432 Mass. at 103. At first blush, Smith's argument appears to have merit, but crumbles when viewed with an eye towards the policy reasons behind double jeopardy.

The United States Supreme Court traced the development of the double jeopardy clause in the constitution, and noted that "[a]t the heart of the policy is the concern that permitting the sovereign freely to subject the citizens to a second trial for the same offense would arm Government with a potent instrument of oppression." *United States* v. *Martin Linen Supply Co.,* 430 U.S. 564, 568-569 (1977). The clause, the Court held, was enacted so that the State may not be permitted to make repeated attempts to convict the accused, thereby subjecting him to embarrassment, expense, and causing him to live in a state of anxiety and insecurity, all the while wondering if he may be found guilty or innocent. *Id.* at 569. However, where there are no threats of successive prosecution, the double jeopardy clause is not offended. *Id.* at 569-570.

The instant case is, in principle, analogous to the situation where a jury returns a verdict of guilt but the trial court thereafter enters a judgment of acquittal. In such a case, an appeal by the government is permitted because a conclusion by an appellate court that the judgment of acquittal was improper does not require the defendant to submit to a second trial; the error can be corrected on remand by the entry of judgment on the verdict. See *United States* v. *Jenkins,* 420 U.S. 358, 365 (1975), *overruled on other grounds, United States* v. *Scott,* 437 U.S. 82 (1978); *Commonwealth* v. *Elder,* 389 Mass. 743, 749 (1983). In the instant case, Smith was not and would not have been, required to submit himself to a second trial. The erroneous allowance of the motion for a required finding of not guilty was corrected before closing arguments, and Smith's counsel had the option to seek a re-opening of the evidence. Smith's counsel did not do so, and it is unlikely he could have produced evidence disputing the length of the firearm used in the shooting because any evidence with respect to Smith's knowledge of the firearm's length would be an implicit admission that he used and/or possessed the weapon.[2]

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[2] Indeed, a trial judge has discretion to re-open evidence when mere inadvertence or some other compelling circumstance . . . justifies a re-opening and no substantial prejudice will occur. *Commonwealth* v. *Cote,* 15 Mass, App. Ct. 229, 241 (1983). In *Cote,* the trial judge allowed the re-opening of the Commonwealth's case after it rested, and after the defendant had moved for a required finding of not guilty. *Id.* at 238-240. The Appeals Court held that in so doing, the trial judge did not commit error because the failure to provide evidence with respect to a particular issue stemmed from a good faith, albeit erroneous, belief by the Commonwealth that a particular burden of proof rested with the defendant, and by allowing the Commonwealth to put on evidence to establish what it was required to prove did not prejudice the defendant. *Id.* at 242-243. Similarly, as noted above, in this case, Smith suffered no

(Continued on following page)

Although no reported Massachusetts case reflects the facts herein, an analogous decision supporting the Commonwealth's contention that the double jeopardy clause did not bar the submission to the jury of the firearms offense is *Commonwealth* v. *Ierardi,* 17 Mass. App. Ct. 297 (1983). In that case, after the defendant was found guilty of the substantive portions of a firearms offense, the Commonwealth introduced evidence of prior convictions in an effort to prove that it was the defendant's third such offense. The defendant moved for a required finding of not guilty, and the trial judge allowed the motion because the Commonwealth had failed to establish that the defendant was the same person named in the prior two convictions, *Id*. at 303. The Commonwealth then moved to re-open its case, informing the judge that it had intended to call the defendant's counsel on the two prior convictions as a witness to establish the necessary identification but had not done so because current defense counsel had agreed to stipulate to identity. Defense counsel acknowledged the stipulation, and the judge allowed the Commonwealth to re-open its case to admit the stipulation. The Appeals Court held, without elaborating, that on those facts there was no violation of the defendant's right not to be put twice in jeopardy. *Id*.

Smith's reliance on *Lowder,* 432 Mass. 92, and *Commonwealth* v. *Super,* 431 Mass. 492 (2000), is misplaced because in those cases, dismissal on double jeopardy grounds was upheld because retrial of the defendant would have required the empaneling of a second jury. In this case, where Smith was convicted by the same jury

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prejudice by the court's "reversal" of its allowance of a required finding of not guilty.

that first heard the evidence against him, and no second jury was needed, Smith was not placed in double jeopardy in violation of his constitutional rights.

II. The Identification Witness' Trial Testimony

Smith contends that an unfair surprise occurred because Nurse Diane Tavares ("Tavares"), one of Robinson's hospital caretakers, changed her testimony with respect to Robinson's hospital room identification of Smith, and that the Commonwealth knew about the testimony and failed to disclose it. The Commonwealth, however, contends that Tavares' testimony did not change, and this court agrees.

During the voir dire, Tavares testified with respect to Robinson's ability to identify the shooter based on the photo array presented to Robinson by the Boston police. Tavares testified that Robinson "was able to physically point with a hand." She further stated that "[Robinson] just pointed [to the pictures] with his finger," and that he was capable of holding a marker, but was not holding one.

At trial, Tavares testified that Robinson, due to a condition known as "wrist drop," was unable to grasp with "fine motor movement" and, thus, could not write. She testified, however, that while the condition did not prevent him from pointing to words on a communication board, it did prevent him from writing. On cross-examination, Tavares testified that Robinson was capable of holding a marker, but could not write. She stated, "[h]e could hold it, but he couldn't – he can't write. He couldn't write with it, he could hold it." Tavares further noted that Robinson could have drawn a "very big" circle, had he been holding a marker.

Thus, at both the voir dire and trial, Tavares testified that Robinson could hold a marker, but that he could not write with it.[3] Smith's assertion of unfair surprise fails because Tavares' testimony did not change, and Smith's motion for a new trial on this point, and his motion for an evidentiary hearing, is denied.

ORDER

Accordingly, it is **ORDERED** that the defendant's motion for a new trial is **DENIED.**

/s/ Elizabeth Bowen Donovan
Elizabeth Bowen Donovan
Justice of the Superior
Court

DATED: June 25, 2001

[3] This court fails to see how the inability to hold a marker would have cast doubt on Robinson's photo identification of Smith. The evidence at trial was that Robinson identified Smith by pointing with his finger, not by using a marker. In any event, the ability to write and the ability to draw a "very big" circle are separate skills and are not inconsistent.

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

SUFFOLK, ss. NO: 00-P-1215

COMMONWEALTH
(Plaintiff/Appellee)

v.

MELVIN T. SMITH
(Defendant/Appellant)

ON APPEAL FROM JUDGMENTS OF THE
SUFFOLK DIVISION OF
THE SUPERIOR COURT DEPARTMENT

CONSOLIDATED BRIEF AND RECORD APPENDIX FOR THE DEFENDANT

for the defendant/appellant
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October 29, 2001

* * *

ARGUMENT

I. REINSTATEMENT OF THE FIREARMS OFFENSE AFTER SMITH RESTED HIS CASE VIOLATED SMITH'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO NOT BE PLACED IN JEOPARDY TWICE FOR THE SAME OFFENSE WHERE THE JUDGE HAD TIMELY ALLOWED SMITH'S MOTION FOR A REQUIRED FINDING AT THE CLOSE OF THE COMMONWEALTH'S CASE.

At the close of the Commonwealth's case, the court allowed Smith's motion for required finding as to the firearms charge. (Tr. 6:67). The judge properly denied the Commonwealth's motion to reopen the evidence. *Id.*; *Commonwealth v. Zavala*, No. 98-P-2114 (Mass. App. Ct. October 10, 2001); *contrast Commonwealth v. Ierardi*, 17 Mass. App. Ct. 297, 303 (1983).[10] *After Smith had rested*, the prosecutor, relying on *Commonwealth v. Sperazza*, 372 Mass. 667 (1977), convinced the judge to "reverse" its allowance of Smith's motion for a required finding on the firearms charge. (Tr. 6:124). The judge allowed the charge to go to the jury and reserved any additional ruling on the motion. (Tr. 6:125).[11]

[10] This is not a case like *Ierardi*, 17 Mass. App. Ct. 297, where the defendant obtained a required finding by agreeing with the prosecutor to stipulate to the barrel length but did not timely inform of the stipulation.

[11] The judge's reversal and "reservation" of decision on the defendant's motion for required finding were also clearly improper under Mass. R. Crim. P. 25(a). To wit, "[i]f a defendant's motion for required finding is made at the close of the Commonwealth's evidence, *it shall be ruled upon at that time.*" *Id.* (emphasis added).

When the judge allowed Smith's motion for required finding, jeopardy terminated as to that charge. *United States v. Martin Linen*, 430 U.S. 564 (1977). Once granted, a motion for required finding at the close of the Commonwealth's case cannot be reversed regardless of whether the court was factually or legally in error in granting the motion.[12] Therefore, the Court must order a judgment of acquittal on that indictment. Further, the firearm indictment surely intertwined in the minds of the jurors with the *armed* assault with intent to murder indictment. *Commonwealth v. Cogswell*, 31 Mass. App. Ct. 691, 699 (1991) (erroneous exclusion of impeachment of one complainant required reversal of related indictment against different complainant). Therefore, a new trial must be ordered as to the latter indictment as well.

* * *

[12] *Commonwealth v. Therrien*, 383 Mass. 529, 535-36 (1981) (preverdict required finding of not guilty terminates jeopardy and bars any further proceedings); *Fong Foo v. United States*, 369 U.S. 141 (1962) (egregious error of trial judge in directing verdict for defendant before close of government's case nevertheless terminated jeopardy and further proceedings prohibited); *Smalis v. Pennsylvania*, 476 U.S. 140, 145 (1986) ("whether the trial is to a jury or to the bench, subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause"); *Arizona v. Rumsey*, 467 U.S. 203, 211-212 (1984) (same); *People v. Strong*, 472 N.E.2d 1152 (Ill. App. Ct. 1984) (consistent with double jeopardy "trial court . . . may not withdraw an order directing a verdict and permit the jury to make a finding on the charge"); *Penn v. State*, 945 S.W.2d 397 (Ark. Ct. App. 1997) (inadvertent grant of directed verdict in bench trial terminated jeopardy and further proceedings barred); *Commonwealth v. Lowder*, 432 Mass. 92 (2000).

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

SUFFOLK, ss. NO: 00-P-1215

COMMONWEALTH
(Plaintiff / Appellee)

v.

MELVIN T. SMITH
(Defendant / Appellant)

ON APPEAL FROM JUDGMENTS OF THE
SUFFOLK DIVISION OF
THE SUPERIOR COURT DEPARTMENT

REPLY BRIEF FOR THE DEFENDANT

---

for the defendant/appellant
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February 28, 2002

* * *

[1-5]

ARGUMENT

I. SMITH WAS IMPERMISSIBLY PLACED TWICE IN JEOPARDY WHERE THE TRIAL JUDGE ALLOWED SMITH'S MOTION FOR A REQUIRED FINDING OF NOT GUILTY AND THEN "REINSTATED" THE PROSECUTION ONLY AFTER THE EVIDENCE WAS CLOSED AND THE CHARGE CONFERENCE WAS COMPLETED.

The Commonwealth argues Smith's right against double jeopardy was not violated because a second jury was not empanelled after the judge entered a required finding of not guilty and then reinstated the prosecution. (Comm. Br. at 19). The judge's ruling violates the prohibition against double jeopardy because the finding of not guilty was final, not interlocutory and barred further proceedings. *United States v. Blount*, 34 F.3d 865, 868 (9th Cir. 1994). The judge denied the Commonwealth's motion to reopen, indicating that the matter was settled. (Tr. 6:67); (Def. Br. at 17); (A.21) (motion for required finding endorsed "allowed" and attested). The prosecution was resurrected only after Smith had rested his defense on the assault with intent to murder and assault and battery by means of a dangerous weapon charges, after a recess, and after completion of the charge conference. (Tr. 6:122-24). *Contrast Commonwealth v. Ierardi*, 17 Mass. App. Ct. 297, 303 (1983) (no double jeopardy violation where counsel immediately alerted court to oversight in failing to introduce stipulation as to barrel length). The federal cases relied upon by the Commonwealth offer it no assistance. (Comm. Br. at 21). The prohibition against double jeopardy is violated where the order of acquittal was not "tentative

or subject to reconsideration."[1] *Blount*, 34 F.3d at 868. Here, the judge immediately denied the prosecutor's motion to reopen and restated her allowance of the motion for a required finding of not guilty. (Tr. 6:67). There was nothing tentative or interlocutory about the judge's ruling. *Contrast United States v. Byrne*, 203 F.3d 671, 674 (9th Cir. 2001) (motion for acquittal granted "unless I can be convinced otherwise"); *contrast United States v. Baggett*, 251 F.3d 1087, 1094 (6th Cir. 2001) (not clear whether motion was allowed or held in abeyance). Further, the trial court in those cases "immediately" reconsidered its order rendering it non-final. *Byrne*, 203 F.3d at 671; *see United States v. Washington*, 48 F.3d 73, 79 (2d Cir. 1995); *United States v. Rahman*, 189 F.3d 88, 133 (2nd Cir. 1998) (order reconsidered prior to further proceedings).

The Commonwealth rejects the persuasive authority cited by Smith merely because some of it is "out-of-state intermediate appellate court cases". (Comm. Br. at 21). It is ironic that the Commonwealth argues to the Massachusetts intermediate state appellate court that precedent from parallel courts is not worthy of consideration. Smith refers the Court to *State v. Blacknall*, 672 A.2d 1170, 1174-75 (N.J. Super. App. Div. 1995), wherein the New Jersey intermediate appellate court rejected the federal intermediate appellate authorities relied upon the Commonwealth.[2]

[1] The judge's reconsideration was clearly impermissible under Mass. R. Crim. P. 25(a). (Tr. 6:124). Rule 25 requires that the motion judge rule on a motion for required finding *at the time that it is made*. Mass. R. Crim. P. 25(a); *Contrast Byrne*, 203 F.3d at 675 (reconsideration not error under Fed. R. Crim. P. 29 where rule explicitly permits judge to reserve ruling).

[2] The federal cases relied upon by the Commonwealth are a line of authority derived from *United States v. LoRusso*, 695 F.2d 45, *cert.*

(Continued on following page)

The reinstatement of the prosecution after the close of evidence and after the charge conference, (Tr. 6:119), deprived Smith of the ability to argue his requests for jury instructions regarding the firearms charge. *Contrast Byrne*, 203 F.3d at 675 (ruling was interlocutory and reconsideration proper where court informed counsel that jury instructions on acquitted count should still be submitted); *see United States v. Parent*, 954 F.2d 23, 26 (1st Cir. 1992) (constitution requires counsel be given opportunity to address instructions prior to court giving them).

Those cases relied upon by the Commonwealth discussing government appeals of orders of acquittal *after* the jury returned a guilty verdict are inapposite. (Comm. Br. at 19). Here, the defendant was *first* acquitted and then unconstitutionally subjected to further factfinding resulting in conviction. *Smalis v. Pennsylvania*, 476 U.S. 140, 145 (1986). The fact that a judge entered the acquittal rather than a jury is irrelevant, *id.*, the relevant inquiry is whether the *first* factual resolution of the case resulted in acquittal. Thus, the policy considerations at issue in the cases relied upon by the Commonwealth simply are not present here.

* * *

denied sub nom Errante v. United States, 460 U.S. 1070 (1983). *LoRusso* does not support the Commonwealth's position. There, no double jeopardy violation was found because the government was allowed to proceed on a *lesser included* offense after the motion for acquittal had been allowed on the primary offense. *Id.* at 52. This is fundamentally different than reconsidering the acquittal on the primary offense. *Baggett*, 251 F.3d at 1098 (Aldrich, J. dissenting).

COMMONWEALTH vs. MELVIN T. SMITH.

No. 00-P-1215

APPEALS COURT OF MASSACHUSETTS

58 Mass. App. Ct. 166; 788 N.E.2d 977; 2003 Mass. App. LEXIS 578

October 16, 2002, Argued

May 21, 2003, Decided

SUBSEQUENT HISTORY:

As Corrected July 10, 2003.

PRIOR HISTORY:

Suffolk, Indictments found and returned in the Superior Court Department on September 26, 1996, and October 8, 1998. The cases were tried before Elizabeth B. Donovan, J., and a motion for a new trial, filed on February 14, 2001, was heard by her.

DISPOSITION:

Judgments affirmed; order denying motion for a new trial affirmed.

COUNSEL:

David J. Nathanson, Committee for Public Counsel Services, for the defendant.

Joseph M. Ditkoff, Assistant District Attorney, for the Commonwealth.

JUDGES:

Present: Cypher, Smith, & Grasso, JJ.

OPINION BY:

CYPHER

OPINION:

CYPHER, J. The defendant, Melvin T. Smith, appeals from his convictions for assault with intent to murder, G.L. c. 265, § 18, assault and battery by means of a dangerous weapon, G.L. c. 265, § 15A, and unlawful possession of a firearm, fourth offense, G.L. c. 269, § 10. The defendant also appeals from the denial of his motion for a new trial.

1. Factual background. A jury could have found the following facts. Codefendant Felicia Brown lived with her mother, stepfather, and two siblings in a three-story building at 33 Lawn Street, in the Jamaica Plain section of Boston.[1] The Brown family occupied part of the second floor of the building and all of the third floor, and rented part of the second floor and all of the first floor to tenants.[2]

---

[1] Brown was indicted on charges of being an accessory after the fact and perjury. The perjury indictment was severed. Brown was tried with the defendant on the accessory after the fact indictment and was acquitted. Following a separate trial, Brown was convicted on the perjury charge; the conviction was later reversed by this court. *Commonwealth v. Brown*, 55 Mass.App.Ct. 440, 771 N.E.2d 214 (2002).

[2] Patrick Veridieu lived in the first floor apartment and Elaine Shaw lived in the second floor apartment.

On August 15, 1996, Christopher Robinson, Brown's cousin, spent the day sitting around the house, drinking alcohol, and smoking marijuana and crack cocaine. At approximately 4:00 A.M., Robinson went from the third floor to the second floor downstairs to lie down. When he reached the bottom of the stairs, he saw Brown and the defendant in Brown's bedroom. The defendant was holding what appeared to be a .32 or .38 caliber pistol.

Robinson testified that as he descended from the third to the second floor, the defendant shot him three times. The defendant said to Brown, "let's go." Robinson said, "I know who you are, Melvin. Why you shoot me? Why you shoot me? I know who you are. Your name is Melvin."[3]

Brown and the defendant left the house. Robinson sought help from Brown's stepfather, who telephoned the police. The police and paramedics arrived within moments of each other.

While the paramedics attended to Robinson, Boston police Officer Wayne Clark asked Robinson who shot him. Robinson replied, "Melvin." Officer Clark asked for a last name, but Robinson said he did not know it. Officer Clark asked Robinson how he knew Melvin, and Robinson told him that Melvin was his cousin's boyfriend.

The shooting severely injured Robinson and destroyed his digestive tract. While in the hospital, Robinson selected a photograph of the defendant from a photographic array and identified the defendant as the person who shot

[3] Immediately after the shooting, Robinson told the police that he did not know Melvin's last name. At trial, however, Robinson testified that Brown had said, "His last name is Smith," as she left the house.

him. At trial, Robinson identified the defendant as his assailant.

On August 25, 1996, Boston police Detective Tony Smith interviewed Brown in the presence of her mother. Brown said that she and the defendant had left because Robinson had been acting crazy and "busting up" the house. Brown told Detective Smith that at the time of the shooting, the defendant was in his car and that she had just approached the house. She said that she heard the gunshots as she walked to the door, and that she and the defendant drove away, to "Tony's." Brown cried during the interview and explained that she was under a lot of pressure. She said that she and the defendant went to a friend's house to use the phone.

The theory of the defense was that Robinson was too intoxicated by drugs and alcohol to correctly identify his assailant and that one of the tenants in the building, Patrick Veridieu, had a motive and an opportunity to shoot him.

2. Discussion. a. The motion for required finding of not guilty and double jeopardy. After the Commonwealth rested, the defendant moved for a required finding of not guilty on the charge of unlawful possession of a firearm, arguing that because the Commonwealth had not introduced direct evidence of the gun's length, the Commonwealth had not proved that the gun met the statutory definition of a firearm. The judge allowed the motion. The allowance of the motion was not communicated to the jury, but it was recorded on the docket.

Later that day, after the defense had rested and before closing argument, the Commonwealth called the judge's attention to *Commonwealth v. Sperrazza,* 372 Mass. 667,

670, 363 N.E.2d 673 (1977), in which the Supreme Judicial Court held that testimony that a gun was a pistol or revolver was sufficient evidence to permit a firearm charge to go to the jury. In light of the case law, the trial judge concluded that the Commonwealth had, in fact, met the *Latimore*[4] standard because the Commonwealth had introduced testimony that the gun was a "pistol" and that it was a ".32 or .38," from which a jury could infer that the gun was less than sixteen inches. The judge decided to submit the charge to the jury. The docket reflects that the motion for required finding of not guilty had been reconsidered and was denied.

The defendant argues that the judge erred because once the motion for a required finding was allowed, jeopardy terminated as to that charge, and the decision cannot be reversed regardless of whether the judge was factually or legally in error in allowing the motion. The Commonwealth responds that because the charge was submitted to the same jury that had heard the evidence, the defendant was not subjected to double jeopardy.

Massachusetts common law and the *Fifth Amendment to the United States Constitution* protect criminal defendants from being placed twice in jeopardy in three circumstances: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. See *North Carolina v. Pearce,* 395 U.S. 711, 717, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969); *Luk v. Commonwealth,* 421 Mass. 415, 419, 658 N.E.2d 664 (1995).

[4] *Commonwealth v. Latimore,* 378 Mass. 671, 677-678, 393 N.E.2d 370 (1979).

The defendant's argument implicates only the first circumstance, a second prosecution after acquittal. See *Commonwealth v. Lowder,* 432 Mass. 92, 103, 731 N.E.2d 510 (2000).

We conclude that double jeopardy protections were not violated in these circumstances because the judge's correction of her ruling did not require a second proceeding. See, e.g., *Commonwealth v. Haskell,* 438 Mass. 790, 792, 784 N.E.2d 625 (2003) (judge's power to reconsider his or her own decisions during pendency of case is firmly rooted in common law); *United States v. Washington,* 48 F.3d 73, 79 (2d Cir.), cert. denied, 515 U.S. 1151, 132 L. Ed. 2d 843, 115 S. Ct. 2596 (1995) (trial judge properly reversed entry of acquittal, after defense case began, where judge did so before informing jury); *United States v. Baggett,* 251 F.3d 1087, 1095 (6th Cir. 2001), cert. denied, 534 U.S. 1167, 152 L. Ed. 2d 126, 122 S. Ct. 1184 (2002) (conviction upheld where trial court entered acquittal but then submitted charge to jury because such reversal did not require retrial). See also *Price vs. Vincent, U.S. Supreme Court,* 155 L. Ed. 2d 877, 123 S. Ct. 1848, 2003 U.S. LEXIS 3678, No. 02-524, slip op. at 6-8 (U.S. May 19, 2003) (reasonable for State court to conclude that judge's comments were not sufficiently final to terminate jeopardy). Furthermore, "a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact." *United States v. Wilson,* 420 U.S. 332, 345, 43 L. Ed. 2d 232, 95 S. Ct. 1013 (1975).

The defendant also argues that the correction was improper under Mass.R.Crim.P. 25(a), 378 Mass. 896 (1979), because the rule requires that the judge decide a motion made at the close of the Commonwealth's evidence

at the time the motion is made.[5] The requirement of a prompt ruling "protects a defendant's right to insist that the Commonwealth present proof of every element of the crime with which he is charged before he decides whether to rest or to introduce proof in a contradiction or exoneration." *Commonwealth v. Cote,* 15 Mass. App. Ct. 229, 240, 444 N.E.2d 1282 (1983). This protection was honored. The defendant has not suggested that the initial allowance of the motion affected his trial strategy with regard to the other charges. Moreover, the Commonwealth did not introduce any additional evidence, and the defendant was provided the opportunity to reopen his case.

Additionally, the defendant has not indicated how the requirement precludes a judge from correcting a ruling. Compare *Commonwealth v. Rice,* 216 Mass. 480, 482-83, 104 N.E. 347 (1914) (no violation of double jeopardy protections by District Court judge's withdrawal of finding of guilt and declination of jurisdiction because case had not been ended at time judge withdrew guilty finding); *Fine v. Commonwealth,* 312 Mass. 252, 258, 44 N.E.2d 659 (1942) (judge has power to alter or amend his decision on motion for new trial at any time during pendency of proceedings before him).

Furthermore, the evidence was not insufficient as matter of law. Compare *Commonwealth v. Ierardi,* 17 Mass. App. Ct. 297, 303, 457 N.E.2d 1127 (1983) (no violation of right not to be put twice in jeopardy where judge indicated he would allow motion for required finding

[5] Rule 25(a) of the Massachusetts Rules of Criminal Procedure provides, "If a defendant's motion for a required finding of not guilty is made at the close of the Commonwealth's evidence, *it shall be ruled upon at that time*" (emphasis added).

of not guilty but then permitted Commonwealth to reopen its case and enter stipulation into evidence). Contrast *Commonwealth v. Zavala,* 52 Mass. App. Ct. 770, 779, 756 N.E.2d 29 (2001) (Commonwealth may not reopen its case when evidence is insufficient as matter of law).

Finally, the defendant was not otherwise prejudiced by the ruling. The jury were not aware that the judge had allowed the motion and the correction of the ruling was made before closing arguments. The judge did not err by correcting her ruling in these circumstances.

b. Unlawful possession of a firearm (fourth offense). A jury-waived trial was held on the portion of the indictment which alleged that the defendant was a four-time offender of the firearms law. See G.L. c. 269, § 10,d. The defendant claims that the judge erred by relying on a Federal conviction for violating the "felon-in-possession" provisions of 18 U.S.C. § 922(g)(1) as one of the three earlier firearms convictions.

Section 10(d) of c. 269 provides:

> "Whoever, after having been convicted of any of the offenses set forth in paragraph (a), (b) or (c) commits a like offense or any other of the said offenses, shall be punished . . . for a fourth such offense. . . ."

The defendant argues that the statute does not specifically permit convictions from other jurisdictions to serve as predicate offenses under § 10(d) and that, in fact, only another conviction for a violation of § 10(d) may be a "like offense." We disagree.

The language of G.L. c. 269, § 10(d), that conviction may be for a "like offense," does not prohibit Federal

convictions from being used as predicate offenses. Contrast *Youngworth v. Commonwealth,* 436 Mass. 608, 611-612, 766 N.E.2d 834 (2002) (language in habitual offender statute requiring predicate convictions "in this or another state" precluded use of Federal conviction). Rather, the statute speaks of a "like offense."

We find no support for the defendant's claim that only another conviction for a violation of § 10(d) may be a "like offense." Had the Legislature intended such a requirement, it would have expressly stated so. *Commonwealth v. Brown,* 431 Mass. 772, 775, 730 N.E.2d 297 (2000).

The statute does not define a "like offense." Where a statutory term is undefined, we may interpret it "in accordance with its generally accepted plain meaning." *Commonwealth v. Boucher,* 438 Mass. 274, 276, 780 N.E.2d 47 (2002). The generally accepted, plain meaning of "like," in this context, means "the same or nearly the same." Webster's Third New International Dictionary 1310 (1993). See *Commonwealth v. Corbett,* 422 Mass. 391, 396, 663 N.E.2d 259 (1996) (under plain and ordinary meaning of term "like offenses," prior convictions for operating under influence were "like offenses" even though prior offenses were misdemeanors and third offense was felony, where elements remained same).

Although the elements of the Federal statute are not identical to the State statute, the offenses proscribed by both statutes are sufficiently alike to be considered "like offenses" for purposes of G. L. c. 269, § 10(d). Both statutes are concerned with keeping firearms out of the hands of those not legally entitled to possess them, in particular, people with felony convictions. See *Huddleston v. United States,* 415 U.S. 814, 824, 39 L. Ed. 2d 782, 94 S.Ct. 1262,

(1974); *Barrett v. United States,* 423 U.S. 212, 220, 46 L. Ed. 2d 450, 96 S. Ct. 498, (1976); *Commonwealth v. Moore,* 54 Mass. App. Ct. 334, 344 n.8, 765 N.E.2d 268 (2002) (intent of G. L. c. 269, § 10, is to protect public from potential danger incident to unlawful possession of such weapons). See also *General Elec. Co. v. Department of Envtl. Protection,* 429 Mass. 798, 805 n.8, 711 N.E.2d 589 (1999) (concluding that two statutes "are like statutes in that similar public policy considerations underlie both statutes"). Cf. *Commonwealth v. Alvarez,* 413 Mass. 224, 230 n.5, 596 N.E.2d 325 (1992) (suggesting that G. L. c. 94C, § 32J, is "like" Federal and other State school zone statutes). The Federal conviction properly served as a predicate offense in these circumstances.

c. Peremptory challenges to three of the four white females. During jury selection, codefendant Brown's attorney challenged three of the four white female jurors. See *Commonwealth v. Jordan,* 439 Mass. 47, 62, 785 N.E.2d 368 (2003) (concluding that art. 12 of Massachusetts Declaration of Rights proscribes use of peremptory challenges to exclude prospective jurors solely by virtue of their membership in group delineated by race and gender). The defendant did not object, but the prosecutor did. The prosecutor asked the judge to find that Brown's attorney had engaged in a pattern of discriminatory strikes. The judge declined, stating, "I'm not going to [address the issue] at this time."

Now the defendant claims that the judge failed to follow the procedural requirements articulated in *Commonwealth v. Burnett,* 418 Mass. 769, 770-771, 642 N.E.2d 294 (1994). According to the defendant, the judge should have made an explicit finding regarding whether the required prima facie showing of impropriety had been

made. *Id.* at 771. Although the judge did not follow the procedure established by the Supreme Judicial Court, procedural error is not a per se ground for reversal. *Commonwealth v. Calderon,* 431 Mass. 21, 27, 725 N.E.2d 182 (2000). The defendant failed to object. If there was error, our review is limited to whether there exists a substantial risk of a miscarriage of justice.[6] *Commonwealth v. Randolph,* 438 Mass. 290, 294, 780 N.E.2d 58 (2002). We conclude that the judge's statement constituted an implicit finding that no discriminatory pattern of peremptory challenges had been demonstrated. If the judge's finding is supported by the record, we afford it substantial deference. *Commonwealth v. Cavotta,* 48 Mass. App. Ct. 636, 638, 724 N.E.2d 332 (2000).

There was no showing of gender-based strikes. After three women had been struck from the jury, two of the three women were replaced with women; therefore, the net effect was a reduction in the number of women on the jury by just one. See *Commonwealth v. Hyatt,* 409 Mass. 689, 692, 568 N.E.2d 1148 (1991) (where two white jurors were replaced with white jurors, there was no showing of race-based strikes); *Commonwealth v. LeClair,* 429 Mass. 313,

[6] We reject the defendant's attempt to derive a more favorable standard of review based on the Commonwealth's objection to the peremptory challenges. We also reject the defendant's attempt, based on the Commonwealth's unsuccessful objection at trial to Brown's exercise of her peremptory challenges, to preclude the Commonwealth from arguing on appeal that Brown's exercise of her peremptory challenges was proper. The defendant has not substantiated either argument with relevant authority. The defendant suggests that his counsel's failure to object constituted ineffective assistance of counsel. For purposes of this appeal, we equate the substantial risk standard and the ineffective assistance of counsel standard. *Commonwealth v. Randolph,* 438 Mass. 290, 297, 780 N.E.2d 58 (2002).

320-321, 708 N.E.2d 107 (1999) (judge acted within his discretion in finding no prima facie case of discriminatory challenges where replacement venire contained roughly equal numbers of men and women and prosecutor struck eight of eleven men and no women). In the present case, there were five women on the deliberating jury.

We are unable to discern from the record the race of the female jurors in the venire or on the deliberating jury. See *Commonwealth v. Arriaga,* 438 Mass. 556, 571-572, 781 N.E.2d 1253 (2003). In these circumstances, where the record is silent as to the racial composition of the venire and the jury, we cannot conclude that the defendant has met his burden of overcoming the presumption that the peremptory challenges were proper. See *Commonwealth v. Burnett,* 418 Mass. at 770 (presumption of correctness ordinarily attends exercise of peremptory challenges).

d. Prosecutorial misconduct. The defendant argues that errors made by the prosecutor established a pattern of intentional misconduct which infected the trial with prejudicial error. We have examined each claim and conclude that the allegations of prosecutorial misconduct are unwarranted.

i. The prosecutor's opening statement. Brown was tried with the defendant on charges of being an accessory after the fact. In his opening, the prosecutor explained to the jury the Commonwealth's theory of the case against both defendants. The prosecutor told the jury that the Commonwealth had to prove that Brown "did something to assist Mr. Smith in avoiding detection, capture, trial, or punishment. And in this case, it's the Commonwealth's allegation that she lied." The defendant moved for a mistrial, which was denied. The defendant argues that

because the judge allowed the defendant's motion to sever Brown's perjury charge, the prosecutor should not have been permitted to state in opening that it was the Commonwealth's position that Brown lied to the police.[7]

The statement was not improper. "Generally, a prosecutor in a criminal action may state anything in his opening argument that he expects to be able to prove by evidence." *Commonwealth v. Cohen,* 412 Mass. 375, 382, 589 N.E.2d 289 (1992). This general rule also permits the prosecutor to state those facts which would have to be proved by inferences. *Commonwealth v. Johnson,* 429 Mass. 745, 748, 711 N.E.2d 578 (1999). Whether Brown had lied was a central issue in the case, and relevant to the charge of accessory after the fact.

ii. Testimony of Detective Smith about the grand jury. During cross-examination, defense counsel elicited from Detective Smith that he had gone to 33 Lawn Street to serve grand jury subpoenas although he had not attempted to interview Patrick Veridieu or Elaine Shaw. During redirect examination, the prosecutor asked Detective Smith whether Veridieu and Shaw had testified before the grand jury. Detective Smith answered that they had.

The defendant objected, but the record does not establish the basis of the defendant's objection. An objection must be sufficient to make the grounds clear to the judge. See *Commonwealth v. Rivera,* 425 Mass. 633, 636, 682 N.E.2d 636 & nn. 1 & 2 (1997); *Commonwealth v. Houghtlin,* 16 Mass. App. Ct. 691, 695, 454 N.E.2d 1289 (1983). Our review is limited, if there is error, to whether

[7] Brown told the police that the defendant was outside the house in a car when Robinson was shot.

any error created a substantial risk of a miscarriage of justice.

The defendant argues that Detective Smith's testimony was hearsay because Detective Smith had no personal knowledge of whether either Veridieu or Shaw testified before the grand jury. The defendant further argues that such hearsay testimony impermissibly suggested that the prosecutor possessed information against the defendant which was not in evidence and that the erroneous admission of the testimony concerning Veridieu effectively left the defendant without a defense: that Veridieu was the shooter. See *Commonwealth v. Loguidice,* 420 Mass. 453, 455, 650 N.E.2d 1254 (1995).

The defendant's challenge on grounds that the testimony was "hearsay" is not persuasive. The defendant's point appears to be that since Detective Smith could not be present in the grand jury room when Veridieu and Shaw appeared, he could only know whether Shaw and Veridieu testified based on the statements of another. The Commonwealth was entitled to rebut the inference suggested by the defendant that the police investigation was inadequate or that they had not diligently pursued the investigation. See *Commonwealth v. Carrion,* 407 Mass. 263, 274-275, 552 N.E.2d 558 (1990). There was no error, but if there were it would not rise to the level of a substantial risk of a miscarriage of justice.

iii. References to the defendant's criminal history. The defendant claims that Detective Smith's reference to the defendant's photograph as being from a booking sheet and another witness's references to the defendant's photograph as a "mugshot" constituted prejudicial error and that the judge erred in not granting his motions for a

mistrial. Instead, on each occasion, the judge promptly instructed the jury to disregard the reference. We conclude that the witnesses' missteps did not require a mistrial and that the judge's instructions to the jury to disregard the references were sufficient in these circumstances.[8] See *Commonwealth v. Robertson,* 408 Mass. 747, 753, 563 N.E.2d 223 (1990); *Commonwealth v. Ellerbe,* 430 Mass. 769, 781, 723 N.E.2d 977 (2000); *Commonwealth v. Lanning,* 32 Mass. App. Ct. 279, 284, 589 N.E.2d 318 (1992). In addition, the judge twice instructed the jury to draw no inferences from the fact that the police had the defendant's photograph in their possession.

iv. Details about Robinson's injuries and recuperation and reference to his suffering. The defendant argues that introduction of evidence concerning the extent of Robinson's injuries and medical complications was substantially more unfairly prejudicial than probative and that the Commonwealth unnecessarily referred to Robinson's suffering in closing argument. The defendant objected to the admission of the medical testimony, so we review to determine whether any error was prejudicial. The defendant did not, however, object to the admission of the medical records or to the closing argument, so our review is limited to whether any error created a substantial risk of a miscarriage of justice.

The Commonwealth argues that the judge did not err in admitting such evidence because the evidence was (1)

[8] The jury were aware that the witnesses were not shown the photographs until several weeks after the defendant had been arrested for the crime. Therefore, the fact that the defendant had been through the booking process or that "mugshots" of the defendant existed would not prejudice the defendant.

probative of the defendant's intent to kill; (2) relevant because one of the defense theories was that Robinson had changed his story to conform to his injuries; and (3) relevant to establish Robinson's physical condition at the time he identified the defendant's photograph.

We agree that the testimony concerning the location of Robinson's wounds and the extensive organ damage he suffered was admissible because it was probative of the issue whether the assailant intended to kill Robinson. See *Commonwealth v. Gill,* 37 Mass. App. Ct. 457, 463-464, 640 N.E.2d 798 (1994). The testimony concerning the subsequent treatment and medical complications, including life-threatening infections, was not relevant on this point. It was, however, relevant as it bore on Robinson's ability to communicate with the police and identify the defendant while in the hospital.

The extensive and detailed medical testimony concerning Robinson's need for a liver transplant to avoid death from complications due to the destruction of his digestive system stretched the limits of relevance. Any error in its admission was not prejudicial, however, as it was cumulative of the other properly admitted evidence of Robinson's injuries and treatment, including Robinson's appearance before the jury. *Commonwealth v. Moreschi,* 38 Mass. App. Ct. 562, 566-567, 649 N.E.2d 1132 (1995).

The medical records were relevant because they assisted the jury in understanding the medical evidence. See *Commonwealth v. McDougal,* 2 Mass. App. Ct. 820, 821, 309 N.E.2d 891 (1974); *Commonwealth v. Gill,* 37 Mass. App. Ct. at 464.

The reference in closing argument to Robinson's suffering was but one sentence in an otherwise proper

argument. In the context of the entire argument, the defendant's concession that Robinson suffered egregiously, and the lack of an objection, the comment did not create a substantial risk of a miscarriage of justice. *Commonwealth v. Duguay,* 430 Mass. 397, 403-404, 720 N.E.2d 458 (1999).

e. Alleged Bruton violations. The defendant claims that his confrontation rights were abridged by the introduction of certain statements of Brown, in violation of *Bruton v. United States,* 391 U.S. 123, 137, 20 L. Ed. 2d 476, 88 S.Ct. 1620, (1968). "According to *Bruton,* severance is constitutionally required where: a codefendant's extrajudicial statements are offered in evidence at a joint trial; the statements are 'clearly inadmissible' as against the defendant; the codefendant does not testify; and finally, there is a substantial possibility that, in determining the defendant's guilt, the jury relied on the codefendant's 'powerfully incriminating extrajudicial statements' notwithstanding any limiting instructions from the judge." *Commonwealth v. Adams,* 416 Mass. 55, 58, 617 N.E.2d 594 (1993), quoting from *Commonwealth v. Pontes,* 402 Mass. 311, 314, 522 N.E.2d 931 (1988).

Here, the defendant does not argue that his trial should have been severed from Brown's trial; rather, he argues that certain statements should not have been admitted. This is a difficult argument for the defendant as he pursued a trial strategy which depended on Brown's statements. In fact, he moved to sever only the perjury charge and stated that "Felicia Brown is [the defendant's] best defense."[9] The defendant did not object to the admission

[9] For a discussion of some circumstances in which a defendant has waived his right to confront witnesses under the Sixth Amendment to the United States Constitution, see *United States v. Stephens,* 609 F.2d

(Continued on following page)

of most of the testimony concerning Brown's statements to Detective Smith or request a limiting instruction. "In reviewing the defendant's conviction, we will 'not disregard the theory of law on which the parties proceeded at trial.'" *Commonwealth v. Silva,* 431 Mass. 401, 405, 727 N.E.2d 1150 (2000), quoting from *Commonwealth v. Monteagudo,* 427 Mass. 484, 487, 693 N.E.2d 1381 (1998). Considering the defendant's trial strategy, the jury's consideration of the hearsay testimony[10] did not create a substantial risk of a miscarriage of justice.[11] *Commonwealth v. Silva,* 431 Mass. at 406.

In looking at each statement, we hold that no error occurred, although for varying reasons depending on the statement. See *Commonwealth v. Devlin,* 365 Mass. 149, 159, 310 N.E.2d 353 (1974) (statement admissible against defendant as statement of joint venturer); *Commonwealth v. Yesilciman,* 406 Mass. 736, 746, 550 N.E.2d 378 (1990) (remarks made during closing argument are viewed in context of entire argument and in light of judge's instructions to jury and evidence at trial); *Commonwealth v. Ivy,* 55 Mass. App. Ct. 851, 857-858, 774 N.E.2d 1100 (2002) (to

230, 232-233 (5th Cir.1980); *Brown v. Artuz,* 124 F.3d 73, 77 (2d Cir.1997), cert. denied, 522 U.S. 1128, 140 L.Ed.2d 135, 118 S.Ct. 1077 (1998); *United States v. Reveles,* 190 F.3d 678, 683 (5th Cir.1999); *United States v. Plitman,* 194 F.3d 59, 64 (2d Cir.1999).

[10] The alleged hearsay statements are Brown's statement to police that she was under pressure; the prosecutor's reference in closing argument to Brown's grand jury testimony; and two witnesses' testimony of Brown's statements to them.

[11] The standard of review is substantial risk of a miscarriage of justice because the defendant either did not object below to the testimony being admitted or, when an objection was raised, did not state any constitutional grounds. See *Commonwealth v. Fowler,* 431 Mass. 30, 41 n. 19, 725 N.E.2d 199 (2000).

exclude such probative statements under strictures of *confrontation clause of Sixth Amendment to United States Constitution* would be height of wrongheadedness, given that confrontation clause has as basic purpose promotion of integrity of fact-finding process). See also *Bruton v. United States,* 391 U.S. at 135 (statement not "powerfully incriminating extrajudicial statement[ ]").

f. Cumulative error. The defendant argues that the alleged errors created a "cumulative" effect requiring reversal. See *Commonwealth v. Smith,* 387 Mass. 900, 912, 444 N.E.2d 374 (1983). As we have concluded that the one error (in the admission of medical testimony regarding Robinson's need for a liver transplant) did not prejudice the defendant, we reject the defendant's claim.

Judgments affirmed.

Order denying motion for a new trial affirmed.